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IN THE

United States 1298

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pacific States Electric Company,
Appellant,

vs.

William D. Wright,
Appellee.

OPENING BRIEF FOR APPELLANT.

RAYMOND IVES BLAKESLEE,
JOHN P. BARTLETT,
Of Counsel for Defendant-Appellant.

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

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STATEMENT.

This case is an appeal, duly taken and perfected, from a decree of the United States District Court for the Southern District of California, Southern Division, in the case of William D. Wright v. Pacific States Electric Company. That case was brought for alleged infringement of claims 6, 7, 8 and 9 of United States letters patent to William D. Wright, No. 1,214,486, dated January 30, 1917, for "Electric Cook-

ing Apparatus." The device alleged to infringe said claims is a waffle iron manufactured by Landers, Frary & Clark, of New Britain, Conn. (which has undertaken the defense of this suit), and sold in the Southern District of California by the appellant, Pacific States Electric Company. The case was tried before His Honor, Judge Trippet, in Los Angeles, who filed an opinion [T. R. p. 174] holding said claims valid and infringed, on which the usual interlocutory decree was entered [T. R. p. 178], an injunction and accounting and costs judgment being stayed on filing of a supersedeas bond pending the termination of this appeal.

The assignments of error [T. R. p. 186] are fourteen in number. They may be grouped under three heads, namely, validity, infringement, and relief, assignments 1, 3, 6, 7, 8, 9 and 10 involving validity of the claims, assignments 2 and 4 relating to infringement, and assignments 5, 11, 12 and 13 relating to relief granted, and assignment 14 title or ownership of the patents sued on in the plaintiff-appellee.

As to validity, appellant claims that in view of the prior art the claims are invalid, certainly when given any such breadth of interpretation as shall include defendant's device; that as to infringement the claims in issue are not infringed by defendant's device under any construction of the said claims that will save them from the prior art, and that as to the relief the court erred in not dismissing the bill and in decreeing an injunction, accounting and costs.

Before discussing these principal issues of validity and infringement, it will be helpful to clearly understand the disclosures of the Wright patent and the claims in issue as related to such disclosure, and also to briefly review the art prior to the patent in suit in the light of which art the claims in issue must be construed.

FIRST.

The Wright Patent in Suit.

This patent is for an invention relating to improvements in

"Electric Heating Apparatus, more particularly to be used for grilling and waffle baking purposes, but which may also be used for any purpose of the ordinary electrically heated stove and which may be folded up so as to occupy a small space when not in use, and which provides a large surface when unfolded" (p. 1 of the patent, lines 10 to 17).

In carrying out this invention, one of the objects is stated to be

"to provide a new and novel construction of waffle iron" (p. 1, line 23),

and another is to provide

"a device of the kind that may be quickly converted from one use to a different use, as from a waffle iron to a grill, or to a device providing a large heating surface when required" (p. 1, lines 26-30).

The title of the patent is "Electric Cooking Apparatus." Therefore, when the claims in issue, as they all do, begin with the words "In a device of the class described," the combinations of elements are to be so interpreted as to make them adapted for, and operative in, such a device.

As the issue here is against a waffle iron pure and simple, and not an electric cooking apparatus that can be *converted* from the waffle iron to a grill, or *vice versa,* or can be used for general heating purposes, the construction which the specification of the patent discloses in detail for all these purposes need not be here set forth in detail.

It will be sufficient to explain that Fig. 1 shows the general construction of the device, in which figure it will be understood that *a* represents a lower member or *grill* member mounted on legs z^5. This member is provided with electric resistance wire for grilling and heating purposes. Mounted on these legs are bent arms represented by *m-m'*. To these is pivotally mounted the lower waffle member *b,* and the mountings are so constructed and arranged that this waffle member can be both moved forward and out of its position above the grill member *a* shown in Fig. 1, and can be rotated or turned upside down so as to bring the waffled surface directly over the heating surface of the lower or grill member. Then there is the upper waffle member *c* and this is not hinged to the casing of the lower waffle member but is attached by hinges that are secured at one end to the upper waffle member

and at the other end to support members z^7 attached to the frame of the grill member. By this construction and mode of operation Wright *disconnects* one waffle member from the other except as both are connected to the supports of the lower or grill member, and is enabled to operate the lower waffle member independently of the upper waffle member so as to take it away from its position over the grill member or rotate it above the same. These hinges of the upper waffle member are lettered *"r"* and *"s"*. They are shown in Fig. 1 and also in Figs. 2 and 3, where their attachment to the supports z^7 and their lack of connection to the lower waffle member clearly appears.

Thus there is a definitely disclosed reason for this *peculiar independent mounting of the waffle irons* of the apparatus of the Wright patent, and thus is made apparent the proposition that if in the Wright apparatus, as shown, the two waffle members were hinged together, as in defendant's device, *the Wright apparatus would be inoperative* because then the lower waffle member could not be moved independently of the upper waffle member. It could not co-operate with the grill member at all. Thus, also, significance is given to the phrase in all of the claims in issue, "In a device of the class described, a pair of casings pivotally connected together." That is, not merely hinged together as in defendant's device, but with a pivotal connection through the supports of the lower grill member so that the lower waffle member may pivot in the manner described in the specification and herein-

above outlined, and that the upper waffle member may also pivot independently of the lower waffle member on supports of the lower grill member, through which, as above explained, the two waffle members have their peculiar pivotal connection with each other. That these three parts are intended to be thus interrelated is emphasized not only by the full description of the Wright specification, but also by the statement (p. 1, line 48) that

"the principal parts of my invention are the base, or grill member *a*, the lower waffle member *b*, and the upper waffle member *c*."

The mounting of the upper waffle member, which we have described, is set forth in the Wright specification, p. 2, lines 75-78, as follows:

"The member *c* is mounted by means of hinges *r* and *s* which are each mounted at one end on the casing *c'* at z^8 and z^9 and on the support z^7 at z^{10}."

The construction of the waffle members themselves is set forth at p. 1, lines 71-83, this description being prefaced by the statement that the waffle members are preferably of aluminum and

"may be of any shape desired"

so that whether the waffle member is rectangular or circular in shape is not of essence to the alleged invention of Wright. The construction of the waffle members, quoting from the reference above made, is set forth as follows:

"The member *b* is composed of an outer hollow casing *n*, which is preferably made of pressed steel,

and is provided with a recess or chamber sufficiently deep to contain the non-conductor n', the heating element n^2, the non-conducting element n^3, and the base portion of the metallic cooking surface member n^4, all in the order in which I have enumerated the same. The metallic cooking surface member n^4 is provided on its circumference with a projecting shoulder n^5 which rests upon and covers the edge of the casing n."

This description obviously sets forth the casing like a box, which box is sufficiently deep to *"contain"* the different elements enumerated, namely, first the non-conducting element, then the electrical resistance or heating element, then some more non-conducting material, and then the base portion of the waffle cooking surface itself. All these parts are fastened together, naturally. The evident intent and belief of the inventor was that his novel construction of waffle member resided in his conception of taking the box-like casing into which, as a box, he placed non-conducting material, electric resistance, heating wire, more non-conducting material, and the waffled cooking surface. Both waffle members are alike in this respect.

Claims 1 to 5, not here in issue, are generally directed to the construction and mode of operation of the lower waffle member with its relation to the grill member. Claims 6, 7, 8 and 9, which are here in issue, are directed more particularly to the waffle members pivotally connected together in pairs, as stated. While these claims may not be limited to the construction which enables one of them to co-operate

with a grill member, still they are to be considered with reference to the device shown and described and the elements of the combinations of these claims are to be understood as elements "in a device of the class described," that is, elements which are directed specifically to the waffle members of the device but which are so constructed and arranged that they will operate as waffle members in the "electric cooking apparatus," which is the subject of the patent. Therefore, when the claims call for casings "pivotally connected together," that language must be considered significant in the light of the specification, and when, as in claim 1, the waffle members are provided with aluminum baking surfaces "mounted *in* each of said casings," and "means mounted *in* said casings * * * for electrically heating said waffle members," the specification only discloses these parts mounted in the casings as though placed in a box and not carried by the bottom of the waffle iron itself; and when, as in claim 7, the aluminum surfaces are mounted in the casings

"so that their surfaces extend **past* the edges of said casings"

the description and drawings show the edges carried past and not flush with the edges of the casing, and when, as in claim 8, the box-shaped casings are connected

"so as to fold one upon the other"

*Italics in quotations in this brief are ours unless otherwise noted.

and the electrical means are

"mounted in the space between said waffle member and said casing,"

the prior description and drawings of the patents show what that language means, as in claim 9 also the words "electrical means mounted in the space between said waffle member and said casing"

and

"a non-conducting element spacing said electrical heating element from said casing"

again clearly refer to the peculiar box-like container construction and mode of operation which the Wright specification sets forth.

To assume that the inventor *intended* or *even had in mind* any mode of operation other than that described in the patent, or a pivoted connection of the lower and upper waffle members which would render the device pictured and described in the patent inoperative, is doing violence to every known principle of construction of letters patent, which are contracts. And yet to find infringement in the case at bar such objectionable interpretation is necessary.

SECOND.

Prior Art.

In general, the art prior to the alleged invention of Wright embraced a wide line of electric cooking apparatus. This is disclosed by sundry patents of

record. Landers, Frary & Clark itself had already, since 1912, put on the market an increasing line of electric cooking apparatus, including percolators, chafing dishes, coffee pots, stoves, grills. [T. R. pp. 37, 45.] Specifically, electric heated waffle irons hinged together had been made and sold by the Simplex Co. for many years prior to the alleged Wright invention. [T. R. pp. 29, 140, 229.] These Simplex waffle irons were shown as Defendant's Exhibit No. 1. Aluminum as a cooking surface was well known generally long prior to the Wright invention and was known specifically for use as a waffle iron

"prior to the earliest date of invention which may be claimed in behalf of the patentee of the patent here in suit." [T. R. p. 66.]

These aluminum waffle irons (Defendant's Exhibit No. 21) were not electrically heated. They did, however, possess all the advantages that aluminum has for a waffle iron, namely, lightness, quick heating, and, at proper temperature, lack of necessity of greasing to keep the cakes from sticking. This last is a relative advantage, because, as Mr. Wright states [T. R. p. 99], this peculiar property of the aluminum exists "at a proper temperature," and, as was stated by counsel to the court [T. R. p. 158],

"Greasing can be dispensed with when using aluminum only unless the heat is just so—if the heat is brought up gradually."

The tag on the old Griswold aluminum waffle iron states that it is not necessary to grease the aluminum griddle to keep the cakes from sticking.

Crompton British Patent [T. R. pp. 169-171]: The drawings of this device show more clearly in the exhibit itself than in the reduced reproduction shown in the transcript of record at p. 171. Also, an hiatus appears to be present at the bottom of transcript of record p. 169. The device was primarily for grilling or cooking meat by electricity and for providing the electrically heated surface with a peculiarly corrugated surface for that purpose. These heating surfaces or plates are shown as rectangular in form, although the patentee states that he does not confine his invention

"to any special form of electrically heated plate." [T. R. p. 170.]

The device is shown and described as being capable of use either with one member alone as a grill, or with one electrically heated member provided with a lid, or cover, or with "two directly heated surfaces" which are shown as hinged or pivotally connected. [See Fig. 1, T. R. p. 171, and specification, T. R. p. 170.] The specific construction of each heating member is not set forth in great detail except as to the heated or cooking surfaces, but the drawings are perfectly clear in showing a casing mounted on legs. This casing is shown as rectangular in shape and of box-like construction. Into this box there is placed, as shown, a filling or spacing material, the heating circuits or electrical resistance wire embedded in enamel or "insulating medium," and the corrugated cooking surface itself. This cooking surface has a flange which covers

and rests on the upper edge of the box-like casing and to which it is attached by screws, thus holding all the parts together. The hinge member attached to the lower casing is shown in dotted lines, Fig. 1, and to the upper lid or casing, if one is used, in dotted lines in Fig. 3. As the specification says that in some cases the patentee prefers

"to use two directly heated surfaces, both of which may be formed as above,"

that is, both of which may have the corrugated or roughened surfaces, and both of which are directly heated by electricity, we have in this Crompton patent a complete disclosure in the broad sense of, in an electric cooking apparatus,

"a pair of casings pivotally connected together,"

with the cooking or baking surfaces covering the upper edge of said casing, with the corrugated cooking surfaces supported on the edge of the casing and spaced apart from the bottom thereof, and

"electrical means mounted in the space"

between said "cooking member" and said casing for heating the cooking member, and

"consisting of an electrical heating element adjacent said"

cooking member, and a

"non-conducting element spacing said electrical heating element from said casing."

Except for the fact that the Crompton iron, although corrugated and ridged, is not stated to be specifically

for waffles, although it is for "culinary purposes," and except for the fact that the heated or cooking surfaces are not specifically described as aluminum (in itself, however, old in the art prior to Wright), we have here precisely the electrical cooking apparatus of the Wright patent in suit so far as that patent may be said to apply to defendant's device. It is shown with electrical connections and of a construction and size that adapt it for table use if desired. It shows every alleged inventive conception that can be ascribed to Wright in the way of constructing a waffle member having a box-like casing into which the non-conducting element, the heating element, and the lower portion of the heated or cooking surface is placed or contained. These are shown as furnished with proper supports, as hinged or pivotally connected, as having the edges of the heated or cooking surface extend as a flange to cover the upper edges of the casing, as connected by socket connection with an electrical conductor, and all of a construction and mode of operation substantially as shown in the Wright patent. It is obvious that the mere substitution of aluminum, in view of the prior art, can not impart patentable novelty to Wright. It is not stated in the Crompton patent whether the casings are of cast metal or sheet metal, but that, in view of the art at the time of the Wright patent, would certainly not impart patentable novelty to Wright.

We submit that this Crompton patent alone is a full prior art showing of anything substantial that is

common to both defendant's device and the Wright patent in suit. Neither it nor the Griswold and Simplex uses were discovered by the Patent Office in the examining of the Wright patent application, and it is therefore incumbent upon the court to reopen, as it were, the question of novelty and invention as pertaining to patentability. The presumptive validity of the Wright patent is therefore of but little legal value, if, indeed, of any legal value.

Lamb Patent No. 1,060,265, April 29, 1913 [Deft.'s Exhibit 13, T. R. p. 254], shows an electrically heated device in which the heated or cooking surface extends over the top of a sheet metal casing to which it is secured. To the bottom of this heated or cooking surface is attached the electric unit with a metal plate, and, with its insulation and wire, in the space between the heated member and the casing, in all senses in which, in defendant's device, such parts may be said to be "between" the heated member and the casing. Substantially this device has been manufactured by Landers, Frary & Clark ever since at or before the date of the said Lamb patent. Substantially this same idea and method of construction has been and is followed by Landers, Frary & Clark in many of its electrically heated cooking utensils, as, for instance, Lamb patent No. 1,060,263, April 29, 1913 [Deft.'s Exhibit 11], also Lamb patent No. 1,060,267, April 29, 1913 [Deft.'s Exhibit 15], Lamb patent No. 1,060,266, April 29, 1913 [Deft.'s Exhibit 14], and others. Defend-

ant's Exhibits Nos. 4, 5, 6, 7, 8, 9, 10 and 16 are physical exhibits showing this general construction.

Capek Patent No. 493,422, March 14, 1893 [Deft.'s Exhibit No. 22, T. R. p. 266], is clearly an illustration of an electrically heated cooking apparatus pivotally connected together so as to fold one upon the other as in a waffle iron (Fig. 7). Both these Capek parts are provided with electric heaters mounted "between" (in the broad sense) the top of the heated member, which extends over the edge of the casing, and the bottom of the casing and made to fold one upon the other for cooking in between, thus cooking "evenly on both sides at the same time," as the Wright patent puts it. As the Capek patent says (p. 2, line 100), when in the position shown in Fig. 7 the two heaters can be used independently, but when moved to closed position

"the substance being cooked being placed between the two heaters."

A model [Deft.'s Exhibit 17] has been made and put in evidence showing the construction of this Capek patent and with a removable top so that instead of a smooth cooking surface a waffled cooking surface may be substituted. The shape and dimensions are different from the waffle irons in question, but the general construction is substantially the same, and "shape" is no part of the invention of the patent in suit, as that patent expressly states that the waffle members

"may be of *any shape* desired."

The testimony of Mr. Lamb for defendant shows that Landers, Frary & Clark

"had begun their work on their waffle iron before you had any knowledge of the Wright patent." [T. R. p. 61.]

"which was made before we knew there was such a patent as the Wright patent." [T. R. p. 59, also T. R. pp. 150-153.]

They simply followed out, in that waffle iron device, the general method of construction of electrical unit, and attachment thereof, of their other considerable line of electric cooking apparatus. The company had been many years engaged in manufacturing household articles (alcohol heated and then electrically heated) and this waffle iron in question was simply an addition to that line of their regular course of development. And in the manufacture of the waffle iron, begun before knowing of the Wright patent, they followed precisely the kind of construction adopted by them long before the alleged invention of the Wright patent.

THIRD.

Defendant's Device.

In defendant's device the casing does not constitute a box-like container, in which are laid the insulating materials and the heating wire, as in the construction of the Wright patent. On the contrary, in defendant's structure the construction of Lamb patent No.

1,060,265 is substantially followed, that is, the heating unit instead of being attached to the casing is attached to the bottom of the heated element (in the case at bar to the waffle iron and in the device of the Lamb patent to the stove surface). A metal plate backs the electrical unit and screws passing through this plate into the waffle iron hold all the parts together as a unit. It is then rested on a casing and attached thereto by screws passing through the sides (as in the Crompton British patent). The waffled surface does have out-turned lips that cover but do not project beyond the edge of the casing. This is common construction in many, if not all, the prior art electrically heated utensils of Lamb patents and Capek patent. There is no patentable novelty in the idea anyhow. Generally speaking, and specifically speaking, there is none. The stove of the said Lamb patent had it long prior to the Wright patent, as also did other prior devices of the manufacture of Landers, Frary & Clark, and it is an obvious mechanical expedient.

In brief, defendant's device is a plain, electrically heated waffle iron, not having the dual capacity of the Wright patent in suit, to be used as a grill or for general heating purposes. Defendant's device has none of the parts and functions that go with that dual capacity. It is an electrically heated waffle iron. So was the Simplex waffle iron long prior to Wright, and, in any event, as the Patent Office informed Wright when he was applying for his patent,

"The application to a waffle iron of an electric heater is not considered patentable broadly." [See F. W. & C. of the Wright patent, T. R. p. 294.]

Obviously, this was because it was well known that at the date of the alleged Wright invention the art was well acquainted with the art of heating by electricity and sundry patents and devices had been granted and were on the market for cooking by heat caused by electricity. Therefore, merely to do the cooking in a waffle iron by electricity was evidently no patentable novelty or creative conception at the date of the Wright alleged invention. Besides, the Simplex waffle iron did that specific thing. And, moreover, as we have seen, Wright also offered no novelty to the art or to the trade in the fact of stating or claiming the use of aluminum for the waffled surface. That was old in the Griswold waffle iron, for instance.

In defendant's device also, instead of having "means *mounted in* said casings between said casings and said waffle members for electrically heating said waffle members,"

as called for in the claims in issue, the means for electrically heating the waffle members in defendant's device are not mounted or *contained in* the casings in the sense shown and described in the Wright patent and the waffle iron laid on top of the same *in* the casings as in the Wright patent, but in defendant's device the means for electrically heating the waffle members are attached directly to the bottom of the waffle member itself, with a metal plate clamping the same to

the bottom of the waffle surface, leaving no air space between the electrically heating unit and the waffle iron, and the metal casing acting as a finish or screen or cover for the other parts, and to cover, and prevent, injury from the leading-in electric, conducting wires.

FOURTH.

Defendant's Device Does Not Infringe.

Not to repeat at length, it is evident from the foregoing that the claims of the Wright patent must be so limited as not to include defendant's device.

(a) *Those claims must be construed in view of the drawings and specification of the patent in suit.* Those drawings and that specification show means and ways of construction and a mode of operation that are different from the means and ways of construction and mode of operation of defendant's device. In the waffle irons of the Wright patent in suit the casings are the peculiar and dominant features. They are made and operate like metal boxes bottoms down and covers off. Into these metal boxes, as containers, and supports, Wright places in the order he names and from the bottom of the box upward, first, a layer of insulating material, then the wire to be electrically heated, then another layer of insulating material, and then, on top of these, the waffle iron itself with its edges projecting over the edges of the box. That was the Wright con-

ception of the way to make an electrically heated waffle iron, use a box as a box and place in the box the parts enumerated and in the order stated.

In defendant's device that is not the construction and mode of operation. In defendant's device the dominant feature *is the heated or waffled surface itself.* Onto the bottom of this is fastened by a clamping metal plate the insulating material and the wire to be electrically heated. A screen or cover is provided, which does not "contain," in the sense of the Wright patent, the parts, but screens or covers the parts and protects the electric, conducting wires leading in from a lamp socket to the waffle iron. The screen does not *contain in* it the parts. No insulating material is first laid in it to "space" the electric resistance wire from it.

"Pivotally connected together," it will be noticed, and understood, that the Wright patent shows and describes casings, not only *containing* certain elements, but "pivotally connected together" (as the claims put it) in a peculiar manner.

In Wright the lower waffle member has to be so mounted that it can make a slide forward and be lowered to a position in front of the grill member of the device, and then can be raised and turned over so as to lie immediately over the top of the grill member and, with it, aid in cooking any substance placed between the two.

Wright patent device inoperative if waffle members are connected as in defendant's device:

Obviously, and certainly, during this movement of the lower waffle member the upper waffle member can not be secured, or pivoted, to it. The two if connected together could not make the slide and the turn in the manner shown and described. The device could not then function, or operate, as shown and described in the Wright patent.

Wright, therefore, shows and describes a hinging of the upper waffle member to the main support of the whole device, independent of the lower waffle member. The two waffle members are not hinged together as in defendant's device, the device of the Capek patent and in the old waffle irons generally (Simplex and Griswold).

In Wright the pivotal connection is peculiar. As his solicitor said, when applying for the claims in suit, the claims are drawn "specific to the structure" shown. [T. R. p. 297.]

If this pivotal connection of the Wright claims be construed to mean any hinged connection of one waffle member to the other, then that is met by the prior art (Crompton and Capek, for instance), and, moreover, then would be claimed a structure totally inoperative to function as the Wright drawings and specification show and describe, and the claims would be void because drawn to a structure that could not operate as the Wright specification and drawings explain and disclose.

It is a well-recognized doctrine of patent law that, when possible, the claims of a patent should be so

construed, in view of the drawings and specification and of the prior art, as to save them. Therefore, as to construe the "pivotally connected together" of the Wright claims to mean a hinging of one waffle member direct to the other waffle member would necessitate invalidating the claims because of inoperativeness, we are forced to construe that phrase to mean substantially the pivotal connection of the upper waffle member to the support itself, independent of the lower waffle iron, and that construction, and mode of operation, and pivotal connection are not present in defendant's device, and there is no infringement.

(b) *The effect, or result, of defendant's device as to cooking waffles may be substantially the same as in the Wright device, but that is not to the point.*

For instance:

> "To make one mechanical device the equivalent of another it must appear, not only that it produces the same effect, but that such effect is produced by substantially the same mode of operation."
>
> *Wilson & Willard Mfg. Co. v. Union Tool Co.*, 249 F. R. 729, 731 (U. S. C. C. A., 9th Circ., 1918).

(c) *The casing of the Wright patent and claims performs the double function of containing, carrying and inclosing, as though laid in a box, the layers of insulating material and of resistance wire for heating,*

and also of having the out-turned flanges of the cooking surface rest on the upper edges of the casing.

Irrespective of the prior art, this is a different construction and mode of operation from that of defendant's device, where the insulating materials, resistance wire, etc., are not so carried *in* the casing but are attached to the bottom of the cooking surface itself, which in turn rests, as in the prior art, on the upper edges of the casing, which forms below a screen or cover. And there is a further difference. Defendant's device has a heat-insulating air space *beneath* its heating element.

In *Cummings v. Baker & Hamilton,* 144 F. R. 395, 399, the U. S. C. C. A., 9th Circ. (1906), had before it a patent for a portable forge which related to improvements in the form and arrangement of the several parts and the method of securing them together. The court recites the different constructions before it, concluding as follows:

> "And as the wind pipe of the defendant in error's forge *does not perform the double function* of the plaintiff in error's wind pipe, no infringement of his patent can be justly affirmed upon the record; for the simple reason that the defendant's forge does not contain the only new element upon which alone the plaintiff in error's patent is sustainable."

In that case, the wind pipe of the patent in suit performed a "double function," as in the patent here in

suit the casing performs a "double function." In the case above cited, one of the reasons for holding non-infringement was that in that case also, as in the case at bar, no "double function" was performed by one of the elements of the patented device.

At best Wright discloses "a mere improvement" on the prior art.

The District Court in its opinion [T. R. p. 174] states that "the claims should be narrowly construed," "in view of the prior art." As the U. S. C. C. A. (9th Circuit) said in *Eaid et al. v. Twohy Bros. Co.,* 230 F. 444, 447, U. S. C. C. A., 9th Circ. (1916), (Chock Attachment for Log Cars):

> *"Being a mere improvement on the prior art,* McConnell is only entitled to the precise devices described and claimed in his patent, and, if the devices embodied in the Chandler patent *can be* differentiated, it is clear that the charge of infringement can not be maintained. Such is the well-established law. *Kokomo Fence Machine Co. v. Kitselman,* 189 U. S. 8, 47 L. Ed. 689; *Boyd v. Janesville Hay Tool Co.,* 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; *Railway Co. v. Sayles,* 97 U. S. 554, 24 L. Ed. 1053; *McCormick v. Talcott,* 20 How. 402, 15 L. Ed. 930."

(d) *Again, even though the ultimate result remains the same, there need be no infringement:*

> "When the changing of those positions so changes the functions of the parts that the machine acquires a substantially different mode of operation, *even though the ultimate result remains*

the same," then "such change" does "avert infringement."

Simplex Window Co. v. Hauser Reversible Window Co., 248 F. 919, 926 (U. S. C. C. A., 9th Circ., 1918).

This same doctrine is clearly adjudicated in *Stebler v. Porterville Citrus Assn.,* 248 F. 927, 930 (U. S. C. C. A., 9th Circ., 1918):

"While the same result is accomplished in the defendant's machine as in the complainant's, there appears to be such a *variation* of means as to avoid infringement in the features complained of. *Cimiotti Unhairing Co. v. American Fur Ref. Co.,* 198 U. S. 25, Sup. Ct. 697, 49 L. Ed. 1100."

To infringe, defendant's device must have done something more than have reached the same result. Thus says the U. S. Supreme Court in

Burr v. Duryea, 68 U. S. 531, 573, 17 L. Ed. 650:

"That two machines produce the same effect will not justify the assertion that they are substantially the same or that the devices used by one are therefore mere equivalents for those of the other."

Also:

Scott et al. v. Fisher Knitting Machine Co. et al., 139 F. 137, 145:

"But this rule does not entitle the patentee to say that another patented machine or some ma-

chine not patented is an infringement of his patent because it produces a fabric similar to his, one that may be used for the same purpose, one that may compete with his in the market, and also fill the same 'long felt want,' unless the same elements of the one machine are used in the other and operate therein in substantially the same way to produce the result."

Even if the patent in suit were a pioneer patent, yet says the U. S. Supreme Court in

Westinghouse v. Boyden Power Brake Co., 170 U. S. 569, 42 L. Ed. 1136:

"But after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than have reached the same result. * * * To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold in other language that he is entitled to patent his function."

As we have explained, there is no infringement by defendant's device when the claims of the Wright patent in suit are read in the light of the specification.

In *Henry v. City of Los Angeles,* 255 F. R. 769, U. S. C. C. A., 9th Circ. (1919), the patent before the court for consideration related to a water wheel governor. This court in that case held that:

"The long established rule of the Supreme and other Federal courts"

is one which limits

> "the scope of every patent to the invention described in the claims in it *read in the light of the specification.*"

In this case also, although both the patented device and the defendant's device were claimed to accomplish substantially the same result, that fact made no difference in the court's decision.

(e) *The prior art demonstrates non-infringement:* In view of that prior art (where other prior electrically heated cooking utensils are shown to have been constructed in substantially the same way that defendant constructs its device in the case at bar, namely, by attaching the electrical unit to the bottom of the heated surface, which surface had out-turned flanges), the claims of the patent in suit must necessarily be so construed and limited as to exclude defendant's device. Take, for instance, the feature of the outwardly extending flanges of the heated surface.

The L. F. & C. stove, the stove of the Lamb patent, and various other culinary devices of the prior art are shown to have had their outer edges or flanges extending over the edge of the casing which supports them and which acts as a screen or cover for the electrical heating and insulating elements underneath and leading in wires. Even though this were not so, it is a most obvious expedient for the mechanic skilled in the art to thus construct and relate the parts. Obviously no mechanic

would make the edge of the heating surface so non-extensive with the edges of the casing as to fall inside the casing and not to be supported on the edges of it. Equally obviously, if it was desired to prevent batter and other materials cooked on the heating surface from falling or dripping down into the casing, any mechanic, without creative invention, would extend the edge of the cooking surface to cover the edge of the casing and prevent such falling or dripping. When the material of that edge is aluminum, old in the waffle iron art, it also tends to prevent batter sticking to other metal parts, by a property inherent in the aluminum itself, when properly heated. The extended aluminum edges also aid in support, as in the prior art.

The Crompton patent shows the very extended edges, or flanges, themselves in a hinged electric cooking apparatus.

Wright shows, and claims specifically, in claims 7, 8 and 9, his flanges extended *past* the casing edges —not so in defendant's device.

As was said by the U. S. C. C. A. for the 9th Circ. in *Willamette Iron & Steel Works v. Columbia Engineering Works*, 252 F. R. 596, where the patent in suit related to a pulley provided with outwardly flaring portions to form a wide throat so that hooks or other attachments on the rope passing over the pulley could pass without danger:

> "But, passing by the question of anticipation as presented by these two patents, is there invention in giving a flare to the sides of the opening in the

> block over the sheave or wheel? It was probably found in practice that with perpendicular sides to this opening a hook or other attachment on the line passing over the sheave or wheel would catch on the one or the other of the sides of the block. If so, what was more simple than to enlarge the opening and gave the sides a flare, so that the hook or other attachment would not catch on either side, but would pass freely through the opening in the block on over the wheel? For this change in the construction of the block mechanical skill was clearly sufficient."

The application of the foregoing quotation to the case at bar is too clear to need further comment.

In *Duer v. Corbin Cabinet Lock Co.,* 149 U. S. 216; 37 L. Ed. 707, the Supreme Court had before it a patent for a furniture lock. One of the features of the lock of the patent in this case was providing a flange, or selvedge, for the lock case which would cover the routed cavity or chamber below it, the court stating (p. 222):

> "The selvedge was made wide enough to cover a cavity corresponding in depth to the projections of such keypost";

and further:

> "It certainly required no invention to make the top-plate or selvedge of the same shape so as to completely cover the cavity."

The court held the patent invalid, although the lock made under it

"gained an immediate popularity"

and

"met with large and increasing sales."

And the court makes a clear statement of the view which courts are to take of the prior art and the position of the patentee as to them, whether the patentee has actual knowledge of prior art or not, as follows (in referring to the patentee of the patent there in suit):

"He is deemed in a legal point of view to have had this and all other prior patents before him."

It is good patent law that if defendant's device is more like the prior art devices than the device of the patent in suit, in other words, reflects the prior art in clear contradistinction from the distinguishing characteristics of the patented thing, it cannot infringe the patent in suit. If we now compare defendant's device with the Crompton patent and the model thereof (the model having been prepared for argument and not introduced on the trial as the Crompton patent was only permitted to be filed after the trial) —and likewise compare defendant's device with the Lamb patent structures and the structures used by defendant, all on the one hand, and compare defendant's device with the Wright patent device and model of its drawings, very compelling conclusions must follow. The defendant's device will be found to be

in all substance in the prior art, its two-membered structure being found in Crompton, and its organization as to construction of heated or waffled surface and heating elements being found in the Landers, Frary and Clark (defendant's) and Lamb patent devices. Defendant's device *does not* follow the teaching or organization of parts of the three-membered Wright patent structure, nor the details of *exact* structure to which the trial court has found the Wright patent must be limited, that is, even assuming there was any teaching in the patent of any two-membered device. Crompton taught using the casing and other elements double or hinged together—*not* Wright.

(f) *There is no infringement in view of the file wrapper and contents of the Wright patent, a consideration of which forces upon the claims in issue limitations not included in defendant's device.*

From the history of the application of the Wright patent it appears that as originally filed his claims were directed to his idea of the combined grill and waffle iron device with its means and mechanism for operating as such. On rejection he amended and presented one claim, among others, namely claim 7, as follows:

"7. In a device of the class described, a pair of waffle members pivotally connected together and means for electrically heating each member of said pair."

This claim, with others, was rejected, and obviously it would be totally invalid in view of Simplex, to say

nothing of any other patent, or general, art. Thereafter he amended into substantially the claims of the patent, stating, at the time that the amended claims were submitted, that

"Applicant's claims are not drawn broadly but are specific to the structure."

With this understanding, the case was allowed. It seems that Wright must now be held to the understanding under which he took his claims, namely, that they were, according to his own statement, understood by him to be *"specific* to the structure." Being specific to the structure, they are not met by defendant's device, in which the parts are not *"mounted in"* the casing in the sense of the Wright patent, but in which, following old electrically heated cooking utensil construction, in the broad idea, defendant has attached his electrical unit, not to the casing, but to the bottom of the waffle iron itself.

It is evident that Wright gave up the idea of disclosing in his patent in suit two waffle irons hinged directly to each other, as in defendant's devices. The application for his patent in suit was filed February 5, 1916. On December 9, 1915, his solicitor sent a sketch [made by Wright, T. R. p. 76] of such a device to Washington to have a "search made as to the patentability of the same." [T. R. p. 215, p. 77.] That sketch is shown at T. R. p. 217. No reply seems to be produced, showing the results of that search. If it had been favorable to patentability there doubtless would have been. The fact is that after time had

elapsed for such reply Wright filed the application for the patent in suit, not showing the two waffle irons hinged directly to each other, but pivotally connected together indirectly through the frame for the purposes set forth. The claims originally filed were directed to a device having that specific kind of indirect pivotal connection, and the claims in suit, later introduced, were drawn to read on that device, were stated by Wright's attorney to be "specific to the structure," were allowed with that understanding and can not now be broadened to include differently constructed waffle irons differently connected together.

Thus in:

Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500:

"But the patentee having once presented his claim in that form and the Patent Office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claims, *or such a construction of his present claim* as would be equivalent thereto."

This was cited in *Marshall & Stearns Co. v. Murphy Mfg. Co.*, 199 F. 772, 776 (9th Circ., 1912).

To this same effect see *Kokomo Fence Machine Co. v. Kitselman,* 189 U. S. 8, 14, 49 L. Ed. 689, 693, as follows:

"Kitselman acquiesced in the rejection and withdrew his nineteenth original claim and *can not*

> *now reasonably claim a construction* which would protect his machine as a pioneer field machine."

In that same Kitselman case the Supreme Court held that

> "* * * *Identity of means and identity of operation* * * * *must be combined* with identity of result to constitute infringement."

Also see:

> *Schultheiss Co. v. Phillips,* 264 F. R. 971, U. S. C. C. A., 9th Circ. (1920):

This case was on a patent for a soil pipe connection for closet bowls. The claims were strictly construed on the doctrine that where a patent was not obtained until after numerous rejections and amendments of claims on reference to prior patents

> "the patentee is limited to the precise form and language of the claims allowed" (p. 973).

The court was of the opinion

> "that complainants failed to sustain the burden resting upon them to show that the defendants to the suit infringed upon the precise form and language of the claims allowed to Bode" (p. 974).

Also, same page, the court is shown to have entertained the view that defendant was following his own earlier patent, not that of plaintiff. The appellant in the case at bar has followed its own Lamb patents and the prior art rather than the teaching of the Wright patent.

(g) *Infringement does not follow because the mere words of any of the claims of the Wright patent are applicable to defendant's device in a broad sense.*

Infringement, in the view of the Patent Law, must be something more than verbal. Thus, see Goodyear Shoe Machine Co. v. Spaulding, 101 F. 990:

> "Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. *Two things are not precisely similar because the same words are applicable to each.* The question of infringement involves consideration of practical utility and of substantial identity and therefore must be quantitative as well as qualitative."

This language was quoted and approved in *Edison v. American Mutoscope Co.,* 151 F. 767, 773 (New York District).

Therefore, we respectfully submit, defendant's device should not be held to infringe the Wright patent in suit.

FIFTH.

If the Claims of the Wright Patent in Suit Are Construed Broadly and Are Construed So as to Include Defendant's Device, Then Those Claims Are Clearly Invalid.

In view of the prior art relating to electrically heated cooking utensils, which we have hereinabove somewhat fully reviewed and which reviewing need not

here be repeated, clearly nothing more than mechanical skill was necessary for the production of defendant's waffle iron so far as that relates to, or resembles, the Wright patent.

(a) *And this is true even if the result effected is the same or even if it is better.* To merely carry forward from the construction of the electrically heated cooking utensil of the Lamb stove patent, and other prior art devices, substantially the same means and method of construction by clamping the electrical unit by a plate to and up against the bottom of the heated cooking surface is but a mere carrying forward of the original thought, changing only form, proportions or degree. This comes within the realm of the mechanic skilled in the art and is not the result of that inventive, creative conception which has been adjudicated by the courts as a necessary adjunct to patentability.

Thus, in *Smith v. Nichols,* 88 U. S. 112, 22 L. Ed. 566, the U. S. Supreme Court had before it a patent for a woven fabric. The fabric produced under the patent seems to have been found by the court to have been better than anything in the prior art and to have been of "greater beauty and value." The court, however, held the patent invalid in view of prior art and stated (p. 119):

> "A mere carrying forward of new or more extended application of the original thought, and change only in form, proportions or degree, the

substitution of equivalents doing substantially the same thing in the same way by substantially the same means *with better results* is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use."

Again, we quote from the law as adjudicated by the U. S. Supreme Court as follows:

"The improvement must be of such a character that it involved invention to make it."

Dunbar v. Meyers, 94 U. S. 187, 24 L. Ed. 35.

And further says the court in *Dunbar v. Meyers* (p. 197):

"Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this court more than a quarter of a century ago that unless more ingenuity and skill were required in making or applying the same improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitutes the essential elements of every invention. Hotchkiss v. Greenwood, 11 How. 267."

Further says the court in the case of *Dunbar v. Meyers* (p. 199):

"Meritorious inventors are entitled to protection; but it is settled law that a mere carrying forward of an original patented conception involving only change of form, proportions or de-

gree, or the substitution of equivalents doing the same things as the original invention by substantially the same means, is not such an invention as will sustain a patent, *even though the changes of the kind may produce better results.* Smith v. Nichols, 21 Wall. 115; 22 L. Ed. 566."

When we thoughtfully weigh the prior art in the case at bar, including the Lamb and Crompton patents and the old electrically heated Simplex waffle irons hinged together and the Griswold waffle iron with aluminum surfaces, how convinced we must be that Wright took no step worthy of being dignified as invention within the authorities, including, further, the following language from section 25, Walker on Patents, Fifth Edition, as follows:

"It is not invention to produce a process, machine, manufacture, composition of matter or design which any skillful mechanic, electrician, chemist, or other expert would produce whenever required to effectuate a given result.

"In holding a patent to be void the Supreme Court, speaking by Justice Bradley, delivered a paragraph of very instructive argument in support of the rule of this section: a paragraph so valuable as to call for its verbatim quotation in this text.

" 'The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward

prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It is never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.'

"This opinion of Justice Bradley is now a classic. Many federal judges, during twenty years, have administered it as law; and some have paraphrased it in sound and suggestive lan-

guage of their own. For example, Judge Phillips has said that: 'In this day of increasing demand for new and enlarged mechanical appliances, the first natural result is the production of a large class of skilled and experienced mechanics and artisans, and, second, a more studious and constant development in applied mechanics. And, as such advance plainly points out, to the attentive and assiduous workman, the natural, larger, practical adaptation of existing, known mechanical devices; to invest each one of these developments with the immunity of a monopolizing patent, would not only be a perversion of the term "invention," but would utterly extinguish the doctrine of mechanical equivalents.' And Judge Coxe has said that a chemical patent is addressed to accomplished chemists; and 'That which seems, to the ordinary layman, to involve the exercise of extraordinary mental power, is to these men nothing but the everyday work of a laboratory routine.' And Judge Townsend has said that an electrical patent should be stripped of the dazzling halo which conventionally adorns appliances designed to deal with that mysterious agent, electricity; when a court is called on to decide the question of the presence or absence of invention, in an electrical patent."

Obviously also all of these prior art devices are clearly analogous one to the other. There is no magic in using two connected heated members for cooking waffles, so as to make a claim for invention, when such members have been used for other culinary purposes. By this token, such a patent as the British

patent to Crompton for apparatus for culinary purposes is thoroughly pertinent in discussing alleged novelty of the later Wright patent for cooking apparatus, whether it be capable of use for cooking waffles or anything else the taste and fancy and desire of the user may dictate. In this connection we quote from Potts v. Creager, 155 U. S. 597, 39 Law. Ed. 275, as follows:

> "As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use, but if the relations between them be remote, and especially if the use of the old device produce a new result, it *may* (the court's italics) at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use."

(b) *No special convenience, availability or popularity seems to have followed in the trade and art from the specific disclosures of the Wright patent in suit.*

> *Nash v. Miner,* 245 F. 349, 354, C. C. A., 7th Circ.:
>
> "no amount of convenience, availability and popularity can overcome the absence of invention. It is the province of mechanical skill to bring to invention effectiveness, which is second only in importance in the advance of science to invention itself."

(c) *The mention or substitution of aluminum in place of iron as the heated cooking surface confers no patentability.*

As we have seen, aluminum for a waffle surface was specifically old in the art prior to Wright. Being old and used for the specific purpose, all the advantages following the use of aluminum were open to the public freely, prior to the Wright patent. Changes of material with no other substantial results than those inherent with the material itself do not confer validity or patentability. Thus, in *Crown Cork & Seal Co. v. Standard Stopper Co.*, 136 F. 841, 849 (C. C. A., 2nd Circuit):

> "The two claims of the patent cover a cap having such a flange. The patentee merely employs the beaded flange of the Thompson patent of 1885. Thompson locked it in an annular groove in the neck of the bottle, while Painter locks it beneath an annular shoulder upon the bottle. It is true, Thompson contemplated using it with a *tin* vessel instead of a *glass* one, either with or without an annular groove. *It could not involve invention* to use the flange on a *glass* vessel instead of a *tin* one, or to press it into contact with an annular shoulder instead of an annular channel. It does the same work with *either material* and with either contact contrivance."

Now, when we consider the Wright patent as construed by the court, as to the claims in suit, even in the light of the Crompton patent device *alone*, we find that there remains no invention whatsoever in Wright. In

other words, if the claims in suit can be construed so as to eliminate the grill member, (to which we do not agree), they must fall because of want of invention over Crompton. The one and only distinction that can be made between the two is the use of the aluminum baking surface. There is no separate claim in the Wright patent on this feature, nor could there be. And its inclusion as a claimed element cannot impart patentability to the manifestly old residue of the claim. Griswold had aluminum baking surfaces or heated or waffled surfaces in his waffle iron, and it makes no difference patentably whether such surfact be electrically heated or dependent upon some other source of heat. This mere change of material to adopt something already known in the art cannot impart invention.

In New York Belting & P. Co. Ltd. *et al.* v. Sierer *et al.*, 149 F. 756, it was said that where stone tiling and other unyielding tiling are old in the art, and rubber tiling is also old in the art, it did not require invention to substitute for a stone tiling having a particular construction of interlocking joint a rubber tiling of similar construction.

In Marshall v. Pettingell-Andrews Co., 164 F. 862, 868, it was found that there is no invention in the substitution of paper for hard fiber, as an insulating lining for incandescent lamp sockets, the characteristics of paper being well known.

In American Acetylene Burner Co. v. Kirchberger *et al.*, 142 F. 744, 747 (decree affirmed on rehearing

147 F. 253), it was held that the use of a refractory material in lieu of metal for a burner, would not involve invention where the substitution developed *no new uses or properties in the burner itself,* and no invention was required in making the change.

A further analogous case is found in the Official Gazette of the Patent Office (123 O. G. 1000), where it was said that it amounts to only mechanical skill to provide an old electro-magnet with an old non-magnetic metal covering for the purpose of rendering the electro-magnet operative under water; and that any one having ordinary skill in the art should know that such a covering should be made of non-magnetic material to avoid interfering with electrical action of the magnet. Thus, in the case at bar, the Griswold waffle iron having taught the art that an aluminum baking surface was preferable, any one having ordinary skill in the art should know that such a surface should be used. Wright certainly was charged legally with knowledge that it *could* be used. *He* did not benefit the art with the imparting of this knowledge.

(d) *Completely anticipated if so construed, or void over prior art.*

It is incumbent upon the court to take these prior devices, such as the Crompton patent device and the Simplex and Griswold devices and examine them to determine what Wright did, if anything, over and beyond what they disclose as old. Nothing can be

found to be *new,* and the whole combination of the Wright patent claims in suit, as construed by the court, is in substance found in Crompton. And the aluminum baking surface is imported from the Griswold device to produce a complete anticipation or prior art showing in negation of invention—at least, so far as any of these claims as construed by the trial court relates to the defendant's device. There is a clearly established rule followed in the Patent Office—which, as we repeat, did not consider the Simplex, Griswold or Crompton structures—well stated by Assistant Commissioner of Patents Newton in *Ex parte* McCollum, Vol. 204 Official Gazette, p. 1346, of date of July 28, 1914, decision rendered March 27, 1914. We quote as follows, (p. 1347):

> "When legitimate combination claims, such as those appealed, are rejected on two or more references, the trend of the best authorities indicates that at least one of the references ordinarily should show the general combination claimed. This the Turcot *et al.* patent does. Then if the specific features claimed and shown by the other reference or references may be substituted without such changes as require invention and perform the function intended the two references may be legitimately combined against the claim; otherwise not."

This rule clearly would have been applied in the present case and the Crompton patent considered as the "reference" showing "the general combination claimed" had the Patent Office found it. If in-

vention results, as stated in this McCollum case, then the combining of two or more prior devices to anticipate may be objected to, that is, when *reorganization* takes place. But no *reorganization* took place in importing Griswold's aluminum baking surface, in the same art, unto the Crompton combination. Organically, the combination—casings, baking surfaces, hinges, electrical resistence, insulation and flanges overlapping the casings—was completed by Crompton. Even the *idea* of an electrical waffle iron was old in the Simplex device. But even the Crompton device could be used as a waffle iron, for there is no magic of invention in suitably shaping the waffled-surface to produce the well-known cups in the surface of the waffle itself.

When, further, we apply to this situation in this art the law as to the demarcation between invention and mere mechanical skill, as in section 25, Walker on Patents, 5th edition, quoted from *supra*, we see that Wright invented nothing when his claims in suit are construed as the court has construed them, and the basic element or grill member is omitted from the combination; and it is clear that the Patent Office would have so ruled had it discovered or cited the Crompton patent, the Simplex device and the Griswold device—or even the Crompton patent alone. Over the Crompton patent device the only essential difference was the provision of aluminum baking surfaces, old in the same art, and used for the same identical

purpose, and this no more savored of invention, we submit, than in the many cases, including those cited just above, where the quality of invention was found lacking in connection with the substitution of one material for another.

As said in American Laundry Machinery Mfg. Co. v. Troy Laundry Machinery Co. Ltd. 171 F. 870, 877, if ordinary mechanical skill is adequate to make the selection of elements from machines in the prior art and their union or combination in a new machine, operating in the old way and accomplishing the same result, *although it may be an improved result,* and no new idea is involved in the process, there is no patentable invention, however great the improvement.

In Kilbourn Knitting Machine Co. v. Liveright & Davidson, 159 F. 494, it was said that where a seamless stocking was old and lace work effect was also old, it did not involve invention to combine these features in a single article.

In Rapp v. Central Fireproof Door & Sash Co., 166 F. 430, the court said that where a fire-proof door consisting of wood incased in metal was old, and paneled metallic doors were also old, it did not involve invention to make a fire-proof door consisting of wood incased in sheet metal, both the wood and metal being paneled.

And clearly there is no *new mode of operation* in the Wright device as the court has construed the claims in suit, and this is important, for, as said in

Louden Machinery Co. v. Janesville Hay & Tool Co. *et al.,* 141 F. 975, 980, the use of a combination of old elements each acting in the old way, which has no new mode of operation, does not involve invention, although the device may have more rigidity, less friction, and better form than devices of the prior art; and the device may be ingenious and practical but it lacks invention. (In this case the factor of less friction is quite comparable to the feature concerned in the use of an aluminum baking surface which is provided to avoid sticking of the dough or batter to such surface.) The court in the latter case said that the combination is ingenious, useful, and even seems to be *without the range of mechanical skill,* but it is not patentable (*Id.* 975, 982).

(e) *No extensive use of Wright patent device:* There has been no such widespread use of the device of the Wright patent, no such extensive sales, no such displacing of other devices, no such commercial activity by the patentee or his assignees or licensees, if any, as would turn the scale in favor of validity where validity otherwise is a question of some doubt, which, we submit, can not, under the circumstances, be in this case. To this proposition reference may be made to the U. S. Supreme Court case of *Duer v. The Corbin Cabinet Lock Co.,* see *supra.*

This lack of going into actual service not only fails to help the question of validity, but it prompts the exercise of much caution in attributing to the claims

of the Wright patent anything more than is plainly shown and distinctly claimed. Thus, says the U. S. C. C. A. for the 6th Circuit, in *National Malleable Castings Co. v. Buckeye M. I. & C. Co.,* 171 F. 847:

> "The use we make of the fact that the device has never gone into actual service is in the construction or interpretation of the patent. We are justified, in view of the facts of this case, in exercising much caution in attributing to this patent anything more than is plainly shown and distinctly claimed."

The above language was quoted by the U. S. C. C. A., 9th Circ. (1919), in *Henry v. City of Los Angeles,* 255 F. 769, 780.

Summary.

Wherein, then, is the creative act, the inventive genius, that imparts patentable novelty to the claims in suit, read on defendant's device? What is "the slight advance made in the invention over the prior art," as the District Court puts it? [T. R. p. 174.]

It has been said that a waffle iron could thus be made of a *size* for table use. But that is a mere matter of mechanical measurement. The patent gives no direction as to size. The cases, their contents, the "flanges" may be of one size or another and still be the same elements. Nothing in the way they are combined affects size.

What is the "slight advance" of the Wright patent that confers patentability? Is it box-like casings?

They are old in Crompton. Is it such casings containing non-conducting material and heating element and roughened cooking surface? They are all in Crompton combined for the same general purpose. Is it hinging such casings together? Crompton, Capek, and Simplex hinged the parts to electrically cook between. And they had casings hinged together. Is it using aluminum? That was old for waffle irons themselves, with all the properties known. Is it a flange to rest on the casings' edges? That was old in Lamb, Crompton, Capek, Landers, Frary & Clark.

We submit no advance, however slight, is to be found that required any inventive genius to accomplish. There was no new entity capable of being defined.

The District Court says [T. R. p. 174] that "the claims should be narrowly construed and should be limited to the precise machine described."

Under such necessities what brings defendant's device within the narrow scope of the claims? That device has aluminum cooking surfaces, to be sure. But Wright, at his date, was not the original inventor or discoverer of that. It has flanges. But Wright did not invent flanges in this sort of device. They were old, as we have shown. The general combination of parts was old. Was it hinged parts? Simplex and Crompton and others already had them. Was it laying the parts all in box-like casings? Crompton had already done it, and defendant does *not* do it. The "advance," if any, in Wright must be found in

features not present in defendant's device. That device, originated independently of Wright, has its own, different construction. Not Wright, but the Lamb electric "stove" was its prototype. The cooking surface is made the part on which heating and insulating elements are mounted in both the Lamb stove and defendant's waffle iron, not casings. Let us not be misled by mere appearance. After the cooking surface, heating element and non-conducting material were fastened together in both Lamb stove and defendant's device, a screen, cover, or protecting finish is attached in both. And that is not the construction of the Wright patent, can not be any "advance" made by Wright, is not "the precise machine described" by Wright. [T. R. p. 174.] The "precise machine described" by Wright seems to have been overlooked by the Trial Judge, when he says that "the patent should not be limited to the grill member," for no machine lacking in a grill member is even suggested by Wright in describing his "precise machine." There is no other "precise machine" of which Wright teaches.

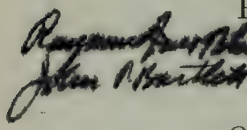
We submit there is no infringement by defendant.

There are no controlling equities in favor of the patent in suit. No trade, or market, had been built up under it, inviting defendant's entry and competition. Landers, Frary & Clark are not copyists. They are reputable manufacturers of a great line of household utilities—had been for many years. They did not copy other percolators, irons, chafing dishes, etc. True, others had been in the market, but of different type.

Landers, Frary & Clark were the first [T. R. pp. 53-55] to combine in the bases of the devices themselves the electrical equipment, replacing alcohol and the like. Defendant's waffle iron came, originating independently with them, as a natural addition to their household "lamp socket" line.

Wherefore, in view of the prior art, and the limitations of the Wright patent itself, we submit that the claims in suit should be held invalid so far as they may be said to be in defendant's device; that construed, as they must be, in view of the prior art, the claims in issue are not infringed, and that the decree of the District Court should be reversed, and the bill of complaint ordered dismissed with costs to appellant.

Respectfully submitted,



RAYMOND IVES BLAKESLEE,

JOHN P. BARTLETT,

Of Counsel for Defendant-Appellant.

No. 3715

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pacific States Electric Company,
Appellant,

vs.

William D. Wright,
Appellee.

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE.

FREDERICK S. LYON,
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FILED

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BRIEF ON BEHALF OF PLAINTIFF-APPELLEE.

This case comes before this court on an appeal from an interlocutory decree adjudging claims 6 to 9, inclusive, of Letters Patent No. 1,214,486, issued on January 30, 1917, to plaintiff William D. Wright, valid and infringed.

Italics, wherever used herein, may be deemed ours.

Plaintiff is a resident of San Diego, California. Defendant Pacific States Electric Company is a distributor or dealer in electrical devices and is only a nominal defendant herein. The real defendant in interest is Landers, Frary & Clark, of New Britain, Connecticut, the manufacturer of the infringing de-

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Italics, wherever used herein, may be deemed ours.

Plaintiff is a resident of San Diego, California. Defendant Pacific States Electric Company is a distributor or dealer in electrical devices and is only a nominal defendant herein. The real defendant in interest is Landers, Frary & Clark, of New Britain,

vices; and that Company has assumed the defense of this case. [Rec. p. 67.]

The bill of complaint is in ordinary form in equity seeking an injunction and accounting. The answer challenges the validity of the patent in suit and denies infringement. The case was tried in open court before District Judge Oscar A. Trippet. Subsequent to the trial and before a decision, defendant obtained leave to file an English patent not offered at the trial. Thereafter the court filed a memorandum opinion [Rec. pp. 174-7] adjudging claims 6 to 9, inclusive, of the patent in suit to be valid and infringed. Pursuant to the opinion an interlocutory decree was entered awarding an injunction and accounting. [Rec. pp. 177-9.]

The Wright Invention.

It is a matter of common knowledge that within the last thirty years electrically heated household appliances have come into widespread general use. Electric heaters, sadirons, stoves, curling irons and the like are today familiar articles in every day use, whereas approximately thirty years ago they were unheard of.

One particular class of electrically heated appliances pertains to devices adapted for use on the dining room or breakfast room table. Every housewife appreciates the electric percolator, the electric toaster and the electric grill. By these appliances breakfast may be prepared at the breakfast table. The electrically heated appliance has the recognition of widespread use and needs no praise from us.

Although a housewife could prepare her coffee in an electric percolator, could make her toast on an electric toaster, and could fry her bacon and eggs on an electric grill, all on the breakfast table, it is a fact that prior to the Wright invention no one had ever produced an electric waffle iron adapted for table use. Prior to the Wright invention waffles had to be prepared in the kitchen. The common waffle-iron comprises a circular stand with a pair of pans hinged together.* Only one of these pans can be heated at a time. This required reversing the pans at the proper time to heat the opposite side of the waffle. Prior to the Wright invention there existed no electrically heated waffle-iron for table use.

In the fall of the year 1915 plaintiff William D. Wright was acting as floor manager in San Diego for a company selling household furnishings. [Rec. p. 69.] At that time Mr. Wright made certain experiments with a gas waffle iron in an endeavor to devise an iron wherein the heat would strike both sides of the iron at the same time; and thereupon the suggestion came to him of producing an electrically heated waffle iron. [Rec. p. 70.]

Mr. Wright thereupon carried forward his suggestion and about the first of November, 1915, completed the device constituting Plaintiff's Exhibit 3. [Rec.

* The common gas heated waffle iron is illustrated by Defendant's Exhibit 21 (a physical exhibit). There was one electrically heated waffle iron prior to Wright's invention which will be discussed hereafter; this iron was adapted only for restaurant use and re-

p. 72.] An examination of this exhibit 3 shows that it comprises a pair of box shaped casings pivoted together by a pair of hinges. Aluminum waffle baking surfaces or members are mounted in each of the casings. The surfaces of the aluminum waffle baking members extend over and cover the upper edges of the casings. This waffle iron is electrically heated by means of electric heating elements positioned adjacent the waffle baking members within the casings, and non-conducting elements insulate the electric heating elements from the casings. Both of the waffle baking members are simultaneously heated.

After completing his first electrically heated waffle iron Mr. Wright gave it to Mrs. Will Crane of San Diego and it was continuously used by her for baking waffles from the fall of 1915 until presented as an exhibit at the trial of this case. [Rec. pp. 74-5, 103-4.] Mrs. Crane testifies that she found the waffle iron, Exhibit 3, "Very, very satisfactory." [Rec. p. 104.] On December 9, 1915, Mr. Wright, through his attorney Mr. Rodabaugh forwarded a sketch of his waffle iron, Exhibit 3, to a patent attorney at Washington, D. C., with the request that an examination or search be made at the Patent Office to determine the patentability of the iron. [Rec. pp. 76-77.] A copy of this letter and the original sketch is in evidence as Plaintiff's Exhibit 4. [Rec. pp. 215-217.]

The waffle iron, Exhibit 3, is a double iron, that is to say, it bakes two waffles at a time. In December, 1915, Mr. Wright completed a smaller or single waffle

iron constructed along the identical lines of the iron, Exhibit 3. [Rec. p. 79.] This single waffle iron has been cut in half or cross-sectioned to disclose the interior construction and is in evidence as Plaintiff's Exhibit No. 6. The iron, Exhibit 6, was used as a demonstration iron. [Rec. p. 80.]

An examination of the iron, Exhibit 6, shows that it embodies the same novel features and principles of construction as are incorporated in the larger iron, Exhibit 3. There is a pair of casings pivoted together. Within these casings are aluminum waffle baking members or surfaces. These aluminum waffle baking surfaces cover the upper edges of the casings. Electrical heating means are positioned in the casings between the waffle baking members and the casings. The electrical heating means are insulated from the casings.

The structure of Exhibits 3 and 6, expressing and embodying Mr. Wright's invention, embraces:

(1) A pair of casings pivotally connected together;

(2) An aluminum waffle baking member or surface mounted in each casing; said waffle baking surfaces

(a) Provided with flanges to cover the upper edges of the casings;

(3) Electrical heating means positioned in the casings between the waffle baking members and the casings and insulated from the casings.

The foregoing structure presents to the art for the first time an electrically heated household waffle iron

adapted for table use. A waffle iron of such character must embody numerous distinctive characteristics and these are found in the Wright waffle iron as follows:

(A) An electric waffle iron for table use must be compact, light and neat in appearance . The common waffle iron comprising a circular stand with a pair of pans hinged together (Defendant's Exhibit 21) is obviously out of the question for table use. Prior to Wright no one ever conceived of making a waffle iron except by employing a cumbersome stand and a pair of pans revolvable on the stand. Wright conceived of substituting a pair of pivoted or hinged casings and mounting in each casing a waffle baking member in lieu of a cumbersome stand and revolvable pans. The Wright waffle iron has a neat box-like appearance. The provision of the box-like casings provides a structure which is compact and light. There are no unsightly excess parts.

(B) An electric waffle iron for table use must be so designed that it will properly heat without requiring more than an ordinary house current. The Wright waffle iron is the first electric waffle iron that will operate on an ordinary house current. It would be impossible to electrically heat the old style base and pan type of waffle iron on an ordinary house current. There would be so much current consumed in heating excess metal that the waffle baking surfaces would not be heated to a cooking temperature. The mounting of the waffle members in box-like casings in the Wright

waffle iron eliminates any excess metal to heat. All of the heat goes to the waffle baking members. To successfully operate with an ordinary house current it is necessary that the heat shall pass as directly as possible to the waffles being cooked and shall not be radiated and dissipated. In the Wright waffle iron the heat passes directly to the waffle baking members because the electrical heating elements are positioned on the under side of the waffle baking surfaces. Wright insured that the heat shall pass from the baking surfaces to the waffles with minimum loss by constructing the waffle baking members of aluminum. Aluminum is a rapid conductor of heat. [Rec. p. 99.] The heat will therefore pass directly to the waffle across the entire face of the baking member. The casings being of pressed steel, practically no heat will be dissipated.

(C) Any housewife who has baked waffles is familiar with the disagreeable task of greasing the old style waffle iron and the smoke that arises from the grease during the cooking. No waffle iron would be satisfactory for table use if it was necessary to grease the iron at the table with a consequent smoking up of the dining-room. The Wright iron requires no grease because of the aluminum baking surface. [Rec. p. 99.] In that connection particular attention is directed to the fact that each of the aluminum baking surfaces in the Wright waffle iron is provided with a flange which covers the upper edge of the casings. This aluminum flange performs a three-fold function in the device.

1. The aluminum flange prevents the waffle batter coming into contact with the upper surface (edge) of the casing to which it would stick in process of baking.

2. The aluminum flange prevents the batter from overflowing and running down between the baking member and casing, thus protecting the electrical heating element.

3. The aluminum flange acts as the principal support for the baking member within the casing.

Mr. Wright describes the functions of the aluminum flange as follows:

"A. It has three missions in being constructed in that form. One is that the continual opening and closing of the device, if it was simply supported by screws, would cause the entire waffle member to drop into the casing by the vibration loosening the screws and stripping the threads off the screws. It also prohibits the pastry from running out of the side and coming in contact easily with the metal surface that the pastry would adhere to. By the pastry adhering to the metal surface, it would make it difficult to remove the pastry from the iron. It also has a third purpose, of keeping the pastry and the oils of the pastry from running down into the element inside and arcing or shortening the element." [Rec. pp. 98-99.]

It is apparent from the above that the Wright waffle iron is made up of a plurality of coacting elements. No one element alone is responsible for the proper functioning of the device. On the other hand, each element performs a necessary part of the whole and

the sum of their efforts makes possible the completed whole. The Wright invention is essentially a true combination of coacting elements. If any one element be eliminated the device fails. The employment of pivoted casings in lieu of a stand and revolvable pans is fundamental in the Wright device. The use of aluminum waffle members in combination with the casings economically and properly directs the heat to the waffle and is essential to table use on a house current. The aluminum flange performs a three-fold function and is necessary to the co-operation of the other elements. We will discuss the prior art specifically at another point herein. At this point we wish to reiterate that Wright was the first to produce an electrically heated waffle iron adapted for table use on an ordinary house current. In the combination of elements constituting the Wright device the following features will be found to be original with Wright and are not found in the prior art:

1. The design of the Wright waffle iron is fundamentally different from the prior art in that Wright employs box-shaped casings carrying the waffle baking surfaces as distinguished from the old style stand and revolvable pans.

2. Wright was the first to employ aluminum waffle baking members in an electric waffle iron, which in combination with the box-shaped casings provides a device that can operate on an ordinary house current.

3. Wright was the first to provide aluminum flanges on waffle baking members to cover the

upper edge of the casings containing the baking members and perform a three-fold function in the device.

Having completed and demonstrated the success of his waffle iron as exemplified in Plaintiff's Exhibits 3 and 6, Mr. Wright conceived the possibility of a further adaptation of this same invention. The thought came to him of also devising a composite device that would embody his waffle iron and also an electric grill. In other words, he determined to try attaching his waffle iron to an electric grill. [Rec. p. 77.] Accordingly in January, 1916, Mr. Wright constructed a composite device constituting Plaintiff's Exhibit 5. An inspection of this device shows that it includes every feature and advantage of Mr. Wright's waffle iron *per se*. Therein the waffle iron is annexed to an electric grill. In operation as a waffle iron, Exhibit 5 functions precisely as do Exhibits 3 and 6. The distinctive features of the box-shaped casings, and the aluminum waffle baking members mounted therein with flanges covering the upper edges of the casings, are all present in Exhibit 5. The operation of Exhibit 5 as a grill is entirely distinct from its use as a waffle iron. In brief, Exhibit 5 presents the not uncommon situation in patent law of a device embodying every attribute of an invention (the Wright waffle iron) to which has been added another separable feature or improvement (the electric grill).

The composite device Exhibit 5 was used with complete success as a waffle iron and was also successfully used to grill bacon, etc. [Rec. pp. 78-79.]

There are thus two aspects to the invention of Mr. Wright. Having conceived the fundamental or "generic" interrelation of elements, including the pivoted box-shaped casings with electrically heated aluminum waffle baking members having flanges covering the upper edges of the casings constituting his novel waffle iron, it was necessary for Mr. Wright to decide, according to his own judgment, upon the best *species* or form in which to express his generic *"idea of means."*

Every invention comprises an abstract "idea of means" expressed in concrete form. There is no idea that cannot be expressed in a number of ways, each expression thereof being the equivalent of every other expression of the same idea. This is universally true. For instance, the idea that an object is round can be expressed in a number of ways. The same idea may be expressed thus: Every point on the object's surface is equally distant from the center of the object.

Where an inventor conceives an idea of means it is always possible to express said idea of means in many different concrete forms. This is true in connection with mechanical inventions.

> "A patentable invention is a mental result. The machine, process or product is but its material reflex and embodiment."
>
> Smith v. Nichols, 21 Wall. 112.

Exhibits 3 and 6 constituting the waffle iron *per se* and Exhibit 5 constituting the composite waffle iron and grill bear out the fundamental proposition that any invention may be expressed in a plurality of concrete forms. Both the waffle iron *per se* and the composite waffle iron and grill are specific expressions of Mr. Wright's generic conception of the primary interrelation of parts necessary for an electrically heated waffle iron adapted for table use. This primary interrelation of parts is present in each of these concrete forms and therefore the iron *per se* and the composite iron and grill are in fact, in the parlance of patent law, "species" of the "generic" invention. In other words, Mr. Wright has developed two different specific devices and each of these devices contains and is a concrete embodiment of his generic invention constituting the fundamental interrelation of parts necessary for an electrically heated waffle iron adapted for table use. Having his generic invention, and two specific concrete forms expressing that invention, we will next take up the manner in which Mr. Wright protected the same in the patent in suit.

The Patent in Suit.

Congress has recognized that every invention can be expressed in many different concrete forms. We, therefore, find in section 4888 of the Revised Statutes the following provision as to what an inventor must embody in his application for letters patent:

> "* * * he shall explain the principle thereof and the *best mode* in which he has contemplated applying that principle, * * *."

According to this section, an inventor is only required to describe, in his application for a patent, "one mode" of embodying his invention in concrete form.

The Patent Office rules are to the same effect and the Patent Office does not require and does not permit an applicant to include, in his application, every possible form in which his invention can be embodied.

In view of the foregoing, an inventor need only show in his patent his preferred form of embodiment of his invention. When he has done this, he is entitled *to claim his actual invention* in whatever form it can be embodied. As said by Judge Ross, in Von Schmidt v. Bowers, 80 Fed. 121, Judge Gilbert concurring:

> "By section 4888 of the Revised statutes it is provided that every inventor, when making his application for a patent, shall file in the Patent Office a written description of his invention; and, if the application be for a machine, he is required to explain the principle thereof, and the *best mode* in which he has contemplated applying the principle, so as to distinguish it from other inventions. But he is not necessarily limited to the one mode shown. The pioneer inventor is entitled to a *generic* claim, under which will be included every *species* included within the *genus*. In addition to such *generic* claim, he may include in the same application specific claims for one or more of the species."

The Wright patent in suit was framed pursuant to the above rule. [Rec. pp. 209-214.] Mr. Wright set forth in his description "one mode" in which he contemplated embodying his invention. He thereupon incorporated in his patent *generic claims* so drawn as to include "every species" employing his invention. The patent also contains "specific claims" limited to the particular *species* or embodiment depicted in the drawings. Mr. Wright sought by such generic claims to cover his generic conception of an interrelation of parts essential to the provision of an electrically heated waffle iron adapted for table use, and sought by the *specific* claims to cover his composite device comprising such waffle iron in combination with a grill member. This was a proper application of the doctrine of *generic* and *specific* claims.

For the purpose of illustrating "one mode" or concrete embodiment of his invention Mr. Wright annexed his patent drawings of the composite device, Plaintiff's Exhibit 5. In the specification of his patent Mr. Wright carefully and fully outlined the interrelation of parts essential to embody his conception of an electric waffle iron adapted for table use. Early in the specification appears the following paragraph:

"Another object of my invention is to provide a new and novel construction of waffle iron." [Rec. p. 211, lines 23-25.]

The interrelation of parts essential to the provision of an electrically heated waffle iron adapted for table use is described as follows:

"The waffle member b is preferably made of aluminum and may be of any shape desired, but my preferred construction is an oblong, rectangular shape. The member b is composed of an outer hollow casing n, which is preferably made of pressed steel and is provided with a recess or chamber sufficiently deep to contain the non-conductor n^1, the heating element n^2, the non-conducting element n^3 and the base portion of the metallic cooking surface member n^4, all in the order in which I have enumerated same. The metallic cooking surface member n^4 is provided on its circumference with a projecting shoulder n^5 which rests upon and covers the edge of the casing n." [Rec. 211, lines 68-83.]

"The member c is identical with member b in structure, composition and arrangement of its parts, hence I shall not describe the member c in detail.

Both of the members b and c are provided on their cooking surfaces with projections d^6 found in the ordinary waffle iron which are of a length so that they will have a space between their adjacent ends when the waffle surface of member c is placed on the surface of member b and the edges of members c and b are resting against each other, as shown best in Figs. 2 and 4." [Rec. pp. 211-212, lines 95-3.]

The operation in baking waffles is described as follows:

"The waffle batter is poured on the cooking surface of the member b after which the member c is revolved on the hinges r and s until its cooking surface is directly above the cooking surface of the member b and the edge of the cooking member n^4 rests upon the edge

of the similar cooking member of the member b." [Rec. p. 212, lines 111-118.]

* * * * * * * * *

"By reason of both waffle cooking surfaces being made of aluminum no lubrication is required on the said cooking surfaces and the waffles are cooked evenly on both sides at the same time." [Rec. p. 212, lines 125-129.]

At the end of the specification to his patent Mr. Wright emphasized that the specific device illustrated in the drawings was only one form in which his invention might be embodied and that he did not intend that his patent should be limited to that specific form, by stating:

"Although I have described my improvements with considerable detail and with respect to certain particular forms of my invention, I do not desire to be limited to such details, since many changes and modifications may well be made without departing from the spirit and scope of my invention in its broadest aspect." [Rec. p. 213, lines 32-39.]

In Kings County Raisin & Fruit Co. v. U. S. Consol. S. R. Co., 182 Fed. 59, this court construes such a statement as showing under the patent law that the inventor intends to cover thereby the broad aspect of his invention and not to limit himself to the specific form illustrated in his drawings.

Pursuant to the doctrine of *genus* and *species* and in accordance with his avowed intent not to limit his patent to the particular form shown in the drawings, Mr. Wright made in his patent two distinct sets of

claims. The first of these sets constitutes claims 1-5, inclusive. Each of the claims of the first set includes the "grill member" and these claims are *specific* and drawn to protect the particular form of device illustrated in the drawings of the patent.

The second set of claims comprises claims 6-9, inclusive. These latter claims are *generic* and as stated by this court in Von Schmidt v. Bowers (*supra*) these generic claims cover "every species included within the genus." All reference to the grill member is omitted from claims 6-9. These claims recite the elements essential to provide an electric waffle iron adapted for table use, and omit everything else that is not essential for such purpose.

As claims 6-9 are the only claims in suit, we shall confine our attention to these claims. In order that the meaning and scope of the claims under consideration may be apparent to the court we shall set forth in outline claim 6 and thereafter refer to claims 7-9 in so far as the latter differ from claim 6. Claim 6 is perhaps the broadest of the claims and includes, "In a device of the class described,

> (1) A pair of casings pivotally connected together,
>
> (2) A waffle member provided with an aluminum baking surface mounted in each of said casings so that each of said aluminum baking surfaces covers the upper edge of one of said casings, and
>
> (3) Means mounted in said casings between said casings and said waffle members for electrically heating said waffle members."

It is apparent from a study of claim 6 that it covers precisely those elements and features which, as we have seen above, comprise the essential elements and features of Mr. Wright's *generic* conception of an electrically heated waffle iron adapted for table use. The claim recites the fundamental conception of a pair of pivotally connected casings with waffle baking members or surfaces mounted in the casings. The claim then states that these baking surfaces shall be of aluminum. The claim expressly provides that the aluminum flange covers the upper edge of the casing in which the baking member is mounted. In the last clause the claim broadly calls for means mounted in the casings for electrically heating the waffle members. A comparison of this claim with the Wright waffle iron Exhibits 3 and 6 and with the composite Wright device Exhibit 5 will demonstrate that the claim may be read on both specific forms in which Mr. Wright embodied his generic invention. *Claim 6 likewise describes defendant's infringing device, Plaintiff's Exhibit 2 with absolute accuracy.*

Claim 7 differs from claim 6 in two respects only. Whereas claim 6 states "that each of said aluminum baking surfaces covers the upper edge of one of said casings," claim 7 provides that the surfaces of the aluminum baking members shall "extend past the edges of said casings." Claim 7 more particularly describes the electric heating means broadly mentioned in claim 6, by stating that the same consists "of an electrical heating element adjacent said waffle member and a non-

conducting element spacing said electrical heating element from said casing."

Claim 8 differs from claim 6 by describing the casings as "box-shaped" and connected "so as to fold one upon the other." Claim 8 does not specify that the waffle members shall be of "aluminum," but states that such members are provided with outwardly extending flanges "whereby said waffle members are supported on the edge of said casing and spaced apart from the bottom thereof."

Claim 9 is identical with claim 8 except that claim 9 defines the electrical heating means in the same manner as does claim 7.

It is apparent from the above that claims 6-9 are generic claims which apply equally to the two specific forms in which Wright embodied his generic invention, *i. e.,* the waffle iron *per se* and the waffle iron in combination with the grill. The court will readily perceive the generic character of these claims 6-9 by comparing them with claims 1-5. The latter claims include as an element the grill member and parts and features pertaining to the grill member. Claims 6-9 contain no reference whatever to the grill member. Under these circumstances claims 6-9 are in law generic claims and cover any form or species embodying the interrelation of elements recited in such generic claims. This doctrine is established by this court in the case of Los Angeles Art Organ Co. v. Aeolian Co. *et al.,* 143 Fed. 880, 884.

> "Tremaine & Pain made three generic claims for 'mechanism controlled by each music sheet to regulate and control the movement of the other music sheet.' *This included the numberless species in which the skilled mechanic or future inventor might embody their creation.* The other claims were for more specific features and elements."

Appellant's brief is based entirely upon a false theory that the specific structure illustrated in the drawing of the Wright patent defines the metes and bounds of the scope of the patent. To the contrary, as stated by this court in Henry v. City of Los Angeles, 255 Fed. 769, quoting from the Supreme Court:

> "It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor."

Appellant's brief ignores the elementary distinction between generic and specie claims. In proceeding upon this false premise appellant has advanced several propositions that are totally unsound when considered in the light of the rule thus ignored. For example, we refer to appellant's treatment of the phrase "pivotally connected together" in claims 6-9. At the bottom of its brief, page 7, appellant states that this phrase does not mean merely hinged together, but means a particular style of connection wherein the lower waffle member may be reversed. There is absolutely nothing in claims 6-9 to support this proposition. Obviously the pair of hinged members in Plaintiff's Exhibits 3 and 6 are

pivotally connected together. Likewise the members of defendant's infringing devices, Plaintiff's Exhibit 2, are pivotally connected together. Indeed, this is expressly admitted in the testimony of Mr. Lamb, defendant's chief witness and vice-president of Landers, Frary & Clark.

"XQ. 130. Now, the waffle irons manufactured and sold for your company include a pair of casings pivotally connected together, do they not?

A. They do." [Rec. p. 56.]

Appellant bases its contention solely on the specific form illustrated in the patent drawing. The obvious answer is that claims 6-9 are generic claims, and being expressed in terms including all embodiments of the generic invention are not limited to details of the form illustrated in the drawings, as to which details the claims are silent.

Of like import is the contention made at page 24 of appellant's brief that unless the phrase "pivotally connected together" in claims 6-9 be construed to mean a particular style of connection wherein the lower waffle member may be inverted, the claims would be invalid because of inoperativeness. This contention is an outgrowth of the false proposition that the specific device illustrated in the patent drawing is the only one embraced in the patent. The doctrine of generic claims is ignored. As a matter of fact if the waffle members be directly hinged together the resultant device constituting the combination of elements expressed in claims 6-9 functions perfectly for baking waffles. This is

demonstrated by Plaintiff's Exhibits 3 and 6, which comprise the precise elements of claims 6-9. The phrase "pivotally connected together" is a broad phrase. It is not as restricted as would be the phrase, pivotally connected together through a grill member. Nor is it as restricted as would be the phrase, pivotally connected directly together. The phrase of claims 6-9 includes both of these latter phrases and is a true example of genus and species. In other words, two members are pivotally connected together both when they are pivotally connected *directly* together and when they are pivotally connected *indirectly* together through a third member.

A further proposition advanced by appellant is that the introductory phrase of claims 6-9 "in a device of the class described" and the title of the patent "Electric Cooking Apparatus" limits the scope of generic claims 6-9 to the specific form illustrated in the patent drawings. We are utterly unable to perceive any logic in such contention. Obviously the subject matter of claims 6-9 is a waffle iron and certainly a waffle iron may be properly classified as an "Electric Cooking Apparatus." We have heretofore pointed out that the patent fully describes the details and purposes of the generic interrelation of elements defined in claims 6-9. We will risk repetition by again quoting from the patent as follows:

"Another object of my invention is to provide a new and novel construction of waffle iron." [Rec. p. 211, lines 23-25.]

Furthermore it is well settled that the scope of claims 6-9 must be determined by the elements recited therein and cannot be limited by an introductory phrase. As said by the Circuit Court of Appeals for the Sixth Circuit in W. W. Sly Mfg. Co. v. Russell & Co., 189 Fed. 61 at 65:

> "The mere use of the word 'crusher' in the amended claim is by no means conclusive of an intent to limit the protection of the patent to the crushing feature. The introductory phrase is not an element of the combination, and does not necessarily limit the claim. E*x parte* Casler, 90 Off. Gaz. Pat. Off. 446."

We submit that Mr. Wright fully conformed to the law by illustrating in his patent one specific form embodying his invention and that he properly set forth in his patent generic claims 6-9 covering all specific forms in which his generic invention might be expressed, thereby fully protecting his waffle iron *per se* and his composite device as intended.

The Prior Art.

Defendant urges that the Wright patent is invalid in view of certain prior patents and devices offered in evidence. These patents and devices cover a period of over twenty years prior to the Wright invention. One of these prior patents was issued in England twenty-two years before Mr. Wright applied for the patent in suit. Obviously defendant has combed the entire prior art with a fine-tooth comb in an endeavor to find an

anticipation of the patent in suit. From a mass of antecedent material defendant has selected the best that existed. This selection was made with the Wright invention in front of the searcher. To aid him, the searcher had that knowledge which is cheapest of all knowledge—*knowledge after the fact.* It is a tribute to the Wright invention that the search failed utterly to find an anticipation. We assert without fear of contradiction that no prior patent or device was found that discloses the elements of Mr. Wright's generic invention recited in claims 6-9.

Under these circumstances appellant has resorted to the time-worn path which constitutes the only path open to the infringer who has no actual anticipation. That path is to mentally reconstruct the prior art in an endeavor to build up in the mind of the court a hypothetical prior art which never *in fact* existed. This is attempted by relying upon one prior patent for one feature, another patent for another feature, and so, by a combination and reorganization of prior patents and devices, build up in the mind a hypothetical device which it is contended, *if it had existed,* would render invalid the patent in suit. But the courts have repeatedly held that a non-existent hypothetical device existent only in the mind for the occasion of the suit is no defense whatsoever. This court so held in Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280:

> "It is not sufficient to constitute anticipation that the devices relied upon might, by a process of modification, reorganization, or combination with

each other, be made to accomplish the function performed by the device of the patent sued on."

As said by Judge Coxe in Johnson v. Forty-second Street, M. & St. N. Ave. R. Co., 33 Fed. 499, 501:

"Of course the accusation that the separate elements of the combination were old is of no moment. *It would be as irrational to charge an author who has produced a sentence of surpassing power and beauty with plagiarism, because the words which he employs have long been found in the lexicon, as to overthrow a patent for a new and useful combination upon the ground that its separate elements are old.* By an ingenious assembling of known appliances this inventor solved the problem the solution of which had been sought for in vain through a long series of years. Although the goal was frequently in sight, it had never been reached; *always some necessary requisite to success was lacking.* The practical disentanglement of the difficulty was left to Newman. He made that a success which before had been tentative and rudimentary. In judging of the invention care should be taken not to underestimate its value, because the apparatus, now that we have seen it work, seems so plain and simple. The test to which this patent has been subjected,—the test which is usually applied to all contested patents,—is certainly severe, and is often misleading and deceptive.

"The defendant assembles every similar device, description, or suggestion in the particular art not only, but also in analogous, and even in remote arts. Everything which has the least bearing upon

the subject is brought in and arranged by a skillful expert in an order of evolution which resembles most closely the invention which is the subject of attack. Having thus reached a point where but a single step, perhaps, is necessary to success, and knowing from the inventor exactly what that step is, the expert is asked if the patent discloses invention, and, honestly, no doubt, answers in the negative. There is always the danger, unless care is taken to divest the mind of the idea added to the art by the inventor, that the invention will be viewed and condemned in the light of ascertained facts. *With his description for a guide, it is an easy task to trace the steps from the aggregation to the invention.* When it is remembered that before Sir Humphrey Davy made his safety-lamp, wire gauze, and lanterns provided with perforated tin cylinders, were well known, it seems in the light of the present as if the idea of substituting the gauze for the perforated tin, being apparently so simple, might have occurred even to a skilled mechanic. So, too, moving the eye from the head to the point of a needle seems, in this age, but a trifling thing; and yet, to the inspiration of genius which suggested these changes we are indebted for two inventions of inestimable value. Carrying the mind, therefore, back to 1871, and judging his combination in the light of what was then known, it is thought that Newman's contribution to the art places him upon the plane of the inventor. What he did was not so obvious a change that it would have occurred to a skilled artisan."

To the same effect are the following words of Lord Justice Moulton, in rendering the decision of the Court

of Appeals in the case of Minerals Separation, Limited, v. The British Ore Concentration Syndicate, Limited, *et al.:*

> "The industrial and scientific problems which face mankind are being attacked all over the world by busy, inventive minds from the most varied points of view. When some lucky inventor has been successful in solving the problem and (whether for the purpose of action or otherwise) the records of past failures or incomplete success are searched, it is common to find that suggestions or adumbrations of each of the various steps by which he has achieved his result are to be found in some one or other of the works of those who have gone before him, and when such records are selected from a mass of antecedent publications and put in an isolated form before a court, there is a danger of their giving rise to a suspicion of a general lack of novelty in the successful invention. *But it must be remembered that these alleged prior publications are the product of a selection made with a knowledge of the successful invention, and that probably hundreds of proposals equally promising, but which point in wholly different directions, have been rejected in the search by reason that they do so.* It is somewhat as though one were to decry the merit of a prospector who had discovered that sands were auriferous by showing that after due rejection of most of the non-metallic particles from a handful of sand the gold may be made to appear visible to the naked eye."

> "The presumption of invention is not overcome by the fact that an expert is able to build up the patented device by selecting parts taken from the prior art."
>
> Kryptok Co. v. Stead Lens Co., 207 Fed. 85.

We do not understand that appellant has had the temerity to maintain that any prior patent or device discloses the combinations of the elements recited in claims 6-9 in suit, but whether maintained or not, it is perfectly obvious that no such prior patent or device existed.

The Crompton Patent.

This patent was issued in England and bears date of May 19, 1893. [Rec. pp. 169-171.] The device illustrated in the Crompton patent is not a waffle iron and cannot be used for baking waffles. The patent states that the Crompton device is to be used for "grilling or broiling meat, toasting bread, grilling slices of pudding," etc. The device is an electrically heated stove. Its resemblance to the Wright invention is more superficial than real and is due to the fact that the heated "plate" is mounted in a casing and covers the upper edge thereof. But there is only one of these casings. The patent states that a "lid" a^x may be added to the plate. The patent drawings illustrate in dotted lines a hinge for connecting the lid to the plate. This hinge is so designed and proportioned that it will support the lid considerably above the plate and leave between the lid and plate an open space. This open space will be

equal approximately to the height of the casing. This open space renders the device totally unfit for baking waffles, because in cooking the waffle batter would escape between the plate and lid.

Crompton had no conception of the fundamental principles of design upon which the Wright invention is based. The thought of producing a waffle iron by substituting a pair of pivotally connected casings with waffle baking members mounted therein, in lieu of the old style circular stand and reversible pan type of waffle iron, is in no manner disclosed in the Crompton patent. Although Crompton illustrated a *single casing* containing an electrically heated plate, Crompton did not suggest or conceive that this principle of design might be applied to a waffle iron. It is apparent that Crompton had no conception of forming a waffle iron by mounting the waffle members in *a pair* of pivotally connected casings. The latter is a radical departure from the common design of waffle iron and was a matter entirely outside the mind of Crompton and his patent is totally silent thereon.

Nor did Crompton conceive or disclose electrically heated aluminum waffle baking members covering the upper edge of the casings. We have heretofore pointed out the prime importance of that construction in the Wright waffle iron. It underlies the fitness of the device for table use. The efficient conductivity of aluminum enables the device to operate on a house current. It permits the device to be used at the table by eliminating a necessity for greasing. All of this was first

conceived by Wright and was totally unthought of and undisclosed by Crompton.

The Crompton device therefore fails to disclose the combination of elements constituting the Wright invention in the following fundamental particulars:

(a) Crompton does not show a pair of casings pivotally connected together.

(b) Crompton does not show waffle members mounted in the casings.

(c) Crompton does not disclose forming the waffle members and flanges covering the upper edge of the casings of aluminum to enable economical consumption of electric current and to eliminate the necessity of greasing the iron.

We have heretofore pointed out that the Crompton device will not bake waffles or perform the novel function of the Wright invention.

As the Crompton patent does not disclose the combination of elements of the claims in suit, it is elementary that the Crompton patent is not a valid anticipation. In the words of Judge Coxe (*supra*):

> "Of course the accusation that the separate elements of the combination were old is of no moment."

Perceiving that Crompton does not disclose the combination and will not perform the function of the Wright invention, appellant has resorted to the suggestion that the Crompton device *might* be altered and reorganized to meet the claims in suit by substituting

a waffle baking member for the plate a, substituting a second casing and a waffle member for the lid a^x, substituting a hinge of proper proportions to enable the casings to meet, and forming the waffle members of aluminum. As appellant has likewise suggested that each of the other prior patents and devices "might, by a process of modification, reorganization, or combination with each other, be made to accomplish the function performed by the device of the patent sued on," we will postpone discussing such unsound contention until we can discuss the same with reference to all the prior art.

The Crompton patent bears date of May 19, 1893, approximately twenty-two years prior to the time when Wright conceived his invention. During all these years no one derived from the Crompton patent any suggestion of the Wright invention. It was only after the trial of this case in the lower court that even appellant discovered any resemblance between the Crompton patent and the Wright invention. [Rec. p. 162.] We believe it perfectly obvious that appellant's contention as to what might be spelled out of the Crompton patent without the necessity of invention is completely overthrown by the fact that such "spelling out" waited twenty-two years for the invention of Mr. Wright.

In judging this Crompton patent it should be borne in mind that it is a foreign patent. The law is well settled that a foreign patent is effective as an anticipa-

tion only to the extent of actual features clearly and exactly described.

Seymour v. Osborne, 11 Wall. 516, 555, 20 L. Ed. 33;

Berry v. Wynkoop etc., 84 Fed. 646, 651, 28 C. C. A. 505;

Westinghouse v. Great Northern, 88 Fed. 258, 263, 31 C. C. A. 525;

Consolidated v. West End, 85 Fed. 662, 665, 29 C. C. A. 386.

At page 32 of appellant's brief appears a reference to a model of the Crompton device. No model was offered in the trial court and apparently appellant will present a model for the first time at the argument before this court. We have never seen the model, if any has been prepared, and are unable to compare it with the Crompton patent to determine if it is a correct representation thereof. We do know that appellant presented to the trial court a supposed model of the device illustrated in the Capek patent in evidence. This model did *not* illustrate correctly the device as described in the Capek patent, but constituted a hypothetical device that embodied the reconstruction of and addition to the Capek patent suggested by appellant. As appellant has suggested numerous changes in the Crompton device to enable it to serve the purpose of an anticipation, it is possible appellant has done as with the Capek model, to-wit, prepared a model not of the Crompton patent, but of a hypothetical device that

never existed except in the mind of appellant's attorney. In fairness we ask that the court use the specifications and drawings of the Crompton patent in lieu of a model not of record. As said in Western Electric Co. v. Home Tel. Co., 85 Fed. 649:

> "To change this record, by permitting theoretical modifications of these earlier patents, would be the same, in principle, as to change, by interpolation or modification, any other evidence between the parties."

The Lamb Patents and Devices.

Appellant has offered in evidence five patents covering electrically heated cooking devices designed by its witness Mr. Lamb, the vice-president of Landers, Frary & Clark. [Rec. pp. 243-263.] These patents illustrate electric chafing-dishes, electric percolators, electric irons, and electric vessels. Appellant also offered in evidence an electric percolator, an electric chafing-dish, an electric stove, together with two electric irons. (Defendant's Physical Exhibits 4-10.) None of the patents or devices shows or constitutes a waffle iron. These devices are all designed for table use. The devices were developed and the patents applied for in 1912. The appellant has thereby established a very significant fact and a fact that cannot be reconciled with its attempt to belittle the Wright invention. Defendant has thus shown that in 1912 it was developing as far as it could a complete line of electrically heated cooking appliances for table use; but did

electrically heated waffle iron for table use. It was admittedly not until after the Wright invention that the infringing device was conceived. Acts speak louder than words. The Lamb patents and devices prove that prior to Mr. Wright's invention an electrically heated waffle iron adapted for table use was unthought of and unknown. The Lamb patents are cogent evidence that defendant and Mr. Lamb consider different electrically heated devices to be individually patentable. We are confident that if Mr. Lamb had produced defendant's infringing waffle iron in 1912 with the other devices patented by him, that defendant would have patented the waffle iron at the same time as the other patents were procured and would now be vigorously asserting the validity of the patent.

Appellant's brief does not specifically discuss the pertinency of any of the Lamb patents except No. 1,060,265. [Rec. pp. 253-256.] This patent illustrates in Fig. 5 of the drawings an electric stove. The only thing appellant can find in common between that patent and the Wright invention is the fact that the cooking surface is mounted on a casing and covers the upper edge thereof. There is no suggestion in the patent of the desirability or the possibility of utilizing even that single feature in an electrically heated waffle iron. The Lamb patent discloses none of the other elements embodied in the Wright invention and patented in claims 6-9 in suit. The Lamb patent shows nothing except that one element of the Wright combination is old. Under elementary principles of patent law the fact

that one element is old or even that all the elements of a combination are separately old does not invalidate a patent for a combination. As said by the Circuit Court of Appeals for the Second Circuit in H. Ward Leonard, Inc., v. Maxwell Motor Sales Corporation, 252 Fed. 584 at 593:

> "The specification of a mechanical combination patent generally discloses a machine consisting of a large number of elements, most of them individually old in the art."

The combination is a separate entity from its component parts and it is immaterial whether the elements of the combination are separately old or new. We will not burden this court by duplicating citations of this and other courts as to this familiar rule. The principle is stated by the Supreme Court in Leeds & Catlin Company v. Victor, 213 U. S. 325 at page 332, as follows:

> "A combination is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and is as much a unit in contemplation of law as a single or non-composite instrument. Whoever uses it without permission is an infringer of it."

The Capek Patent.

This patent is for an electrically heated vessel and was issued on March 14, 1893. [Rec. pp. 265-270.] Capek had no conception of an electrically heated waffle iron or how to make one and his patent is totally silent

Wright invention is restricted to the arrangement outlined in Fig. 7 of the Capek patent drawings. That arrangement is composed of an outer "vessel" 26 [Rec. p. 269, line 39] and a "cover" 45. [Rec. p. 269, line 89.] The outer vessel and cover are connected by means of a complicated hinge construction designated 42, 44 in the drawing. An "inner vessel" 1 is positioned in the outer vessel 26 and a duplicate "inner vessel" 47 is positioned in the cover 45. [Rec. 269, line 93.] Electric heating elements are annexed to the bottom of the inner vessels and are indicated in figure 7 by 18 and 46, respectively.

Figure 7 clearly indicates that the "inner vessels" are bowl-shaped and of considerable depth. This renders the device totally unfit for baking waffles. Of course, Capek had no thought of how to construct a waffle iron and, therefore, the bottoms of the vessels are not formed with the required waffle forming projections. But that is not the greatest difficulty in the way of baking waffles with the Capek device. If waffle batter was placed on the bottom of the inner vessel 1 and the cover folded over there would be so great a distance between the two heated surfaces that the waffle batter could not possibly contact with the upper surface to bake and form. Fundamentally the Capek device cannot function as a waffle iron for the same reason as any kettle cannot be said to be a waffle baking member.

In addition to being fundamentally unsuited in design for baking waffles the Capek device lacks essen-

tial elements of the combination of the claims in suit. The Capek device has no waffle baking members or surface as called for by claims 6-9 of the Wright patent. The Capek patent makes no suggestion of forming waffle members of aluminum, which is necessary in a waffle iron adapted for table use to economize on current and eliminate greasing.

Appellant appreciates that the Capek device as illustrated in figure 7 of the Capek patent does not contain the Wright combination and cannot perform the function of the Wright invention. Therefore, in presenting an asserted model of the Capek device appellant has not presented a model constructed according to the Capek patent, but has reorganized and reinvented the Capek device to show how it *might* have been but was not made to meet the Wright invention and function as a waffle iron. This hypothetical model constitutes Defendant's Exhibit No. 17. In reference to this model it should be remembered that it is not a model of the Capek device as illustrated in the patent. It is a model of a device that never existed in the prior art at all. In the model has been incorporated features that were first invented by Mr. Wright and the maker of the model got his knowledge of those features from the patent in suit. In other words, the model was one of those "illustrative" propositions prepared solely for the purpose of the suit. In fact, it illustrates the thing that did not exist in the art prior to the Wright invention. This was made clear by the trial court to whom counsel for appellant stated, "It was just made

up for this case." [Rec. p. 133.] The model differs from the device illustrated in figure 7 of the Capek patent in substituting waffle baking members for the inner vessels, and by making the cooking surfaces approximate the juncture of the outer vessels so that the two waffle members will be spaced properly from each other in operation. A practical hinge has been substituted for the arrangement illustrated in the Capek patent. The model as submitted does not have the waffle members made of aluminum and lacks the electric heating means included in the Wright combination.

It may appear to us now that the aforesaid alterations are simple. But they are simple to us because we have first had their possibility demonstrated to us by observation of the Wright invention. Until Mr. Wright made his invention no one perceived any of the possibilities in the Capek device urged by appellant to be so obvious. The Capek patent was issued in 1893 and during the more than twenty years between its issuance and Mr. Wright's invention no one gained from the Capek patent a disclosure of the waffle iron in issue. *In 1912 when defendant Landers, Frary & Clark was bringing out its line of electrically-heated appliances for table use it saw no such possibilities in the Capek patent, which was then twenty years old.* The lapse of twenty years during which the Capek patent laid dormant is ample to establish that it did not suggest what is urged by appellant. With regard to a similar situation, the Circuit Court of Appeals for the

Seventh Circuit, in Faries v. Brown & Co., 121 Fed. 546, at 550, said:

> "The advance seems simple enough. One wonders why, pending its adoption, twelve years went by. But the same wonder accompanies every step forward in the useful arts. The eye that sees a thing already embodied in mechanical form gives little credit to the eye that first saw it in imagination. But the difference is just the difference between what is common observation and what constitutes an act of creation. The one is the eye of inventive genius; the other of a looker on after the fact."

The Simplex Iron.

A specimen of this device constitutes Defendant's Exhibit 1 and the same is illustrated in a catalog of the manufacturers dated April 12, 1904. [Rec. pp. 227-230.]

The Simplex iron was the only electrically heated waffle iron that existed prior to the Wright invention. Admittedly the simplex iron will not perform the function of the Wright iron and is more expensive in manufacture. Before discussing these differences in function and cost we will outline the differences in design responsible for the same.

The Simplex iron is formed with a large metal stand. This metal stand is provided with two sets of cavities to receive the waffle baking members when the same are in open or unfolded position. During the baking operation half of this stand is useless. It is apparent

that the one who designed the Simplex iron never got out of sight of the old-fashioned stand and revolvable pan arrangement. The idea of the neat and simple box-like formation presented by the Wright invention wherein the entire iron and component parts are included within a pair of folding casings, is a radical departure from the Simplex iron as well as from the old gas iron like Defendant's Exhibit 21, Griswold iron. The Simplex iron also lacked the aluminum baking surfaces and, of course, having a stand instead of folding casings, did not provide flanges covering the upper edges of the casings. The Simplex iron does not, therefore, contain the elements included in the combination of claims 6-9 in suit.

The cumbersome design of the Simplex iron involved so much metal and so inefficiently distributed the heat that the device requires more than an ordinary home current for operation. It is adapted for restaurant use only. The Simplex iron is a more expensive iron to manufacture than one made in accordance with the Wright invention. Mr. Lamb admits that the Simplex iron is not adapted for table use, as it will not operate on a house current and is more expensive to manufacture:

"A. * * * It would be impossible to produce the Simplex iron at the same price and it could not be used in the same way.

RXQ. 176. Why not?

A. Because it takes more current than goes on a lamp socket." [Rec. p. 65.]

Since the Simplex iron does not contain the combination of elements in the claims in suit and will not perform the function of the Wright device, it is elementary that the Simplex iron is not an anticipation.

> "It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, *if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.*"
>
> Topliff v. Topliff, 145 U. S. 156, 36 L. Ed. 658 at 661.

"It Is Much Easier to Add Than to Invent."

Appellant is unable to show any prior patent or device upon which claims 6-9 of the patent in suit may be read. Therefore, appellants have resorted to relying upon one prior patent for one feature, another prior patent for another feature, and so, by a method of reorganization and combination of prior patents and devices build up in the mind only, a device which, *if it had existed,* might invalidate the Wright patent.

For example, appellant asserts that the Crompton patent illustrates a cooking surface mounted in a casing covering the upper edge thereof, that the Capek patent illustrates a pair of pivotally connected casings, that the Simplex iron illustrates a waffle iron having a pair of electrically-heated waffle baking members and that the Griswold iron has aluminum baking surfaces. Thereupon appellant urges that the Wright patent is

might be gathered together and combined the elements necessary to form the Wright invention. Appellant then urges to the court that such gathering together is so obvious that the decree of the trial court should be reversed and the Wright patent held void for lack of invention.

The test the court is asked to apply is very unfair both to the court and to the inventor. The court is required to judge the mental process involved in the production of the invention, but the court cannot view the problem except *ex post facto*. The inventor created the invention out of his imagination. The court is deprived of imagination because it has first examined the completed invention. It was one thing to *create* the combination of elements and features; it is an entirely different thing to view a number of prior patents and see if there exists the elements which might be added together to comprise the combination. Courts have long recognized this difference. In 3 Coke's Institutes 184 we find the statement:

"It is much easier to add than to invent."

In final analysis the assertion of appellant in this case is that because it seems easy to *add* the elements together from the prior art, Wright made no invention. This is a very unsound proposition and if accepted would constitute an extremely dangerous precedent. This court in Stebler v. Riverside Heights Orange Growers Association, 205 Fed. 735, 738, unequivocally overruled the same contention:

"True, we may pick out one similarity in one of these devices, and one in another, and still one in another, and, by combining them all, anticipate the inventive idea expressed in the Strain patent, but the combination constituting the invention is not found in any one of them. As we had occasion to say in Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 C. C. A. 446:

" 'It is not sufficient, to constitute an anticipation, that the devices relied upon might, by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent.' Western Elec. Co. v. Home Tel. Co. (C. C.), 85 Fed. 649; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Gunn v. Bridgeport Brass Co. (C. C.), 148 Fed. 239; Ryan v. Newark Co. (C. C.), 96 Fed. 100; Simonds R. M. Co. v. Hathorn Mfg. Co. (C. C.), 90 Fed. 201-208; Gromully & J. Co. v. Stanley Cycle Co. (C. C.), 90 Fed. 279; Merrow v. Shoemaker (C. C.), 59 Fed. 120." (Italics ours.)

We believe this court has always followed the rule in the Stebler case and that there is no question but that it is the established law of this country.*

* For other cases to the same effect see, for example, Bates v. Coe, 98 U. S. 31, 48, 25 L. Ed. 68; Topliff v. Topliff, 145 U. S. 156, 36 L. Ed. 658; Disc Grader & Plow Co. v. Austin-Western Road Machinery Co., 254 Fed. 430 at 433 (C. C. A. 8th); Stromberg Motor Co. v. Zenith, 254 Fed. 68 at 75 (C. C. A. 7th); St. Louis v. American, 156 Fed. 574 (C. C. A. 8th).

In Wire Wheel Corporation v. Madison Motor Car Co., 267 Fed. 220, the court said:

> "It is not difficult, after a problem has been solved, to take patent after patent, pick one feature from one patent, and another from the next, and then say the completed product is so near the patented product that the final step constituted but the work of a mechanic. But invention cannot be so determined. Rather must the mark of distinction fall on him who, appreciating both the means and desired ends, conceives of a relation of elements, old or new, in whole or in part, that will produce the desired results. It is quite immaterial if, after the conception is announced, the skilled mechanic readily understands it, or with slight or no difficulty builds the new device by practices or means well known to his trade."

The fact that it now seems simple or even obvious to combine the various elements to provide the combination of the claims in suit does not establish non-invention. As said by this court in Doble v. Pelton Water Wheel Co., 186 Fed. 526:

> "Simplicity of a device is no evidence of want of invention nor obviousness, but in such cases the question of patentability may, and in many cases must, be determined largely from the results obtained."

Again in Snow v. Kellar-Thomason Co., 241 Fed. 119-123, this court said:

> "True, the discovery was exceedingly simple, and it is an object of wonder why everybody, or at least every mechanic, did not appreciate the

mechanical effect. Yet it is true that no one seems to have known it. But because the contrivance appears simple after it has been once developed affords no absolute reason why it lacks novelty. Indeed, the most simple contrivances sometimes present the clearest examples of the product of inventive faculty, and we quite agree with the learned district judge that the present device involves invention. 'It involves that which is new in the art, the last step, as it has been termed.' See Gandy v. Main Belting Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272."

It is easy for appellant to urge that this or that does not involve invention, but the Supreme Court of the United States has said:

"It possesses such amount of change from the prior art as to have received the approval of the Patent Office, and is entitled to the presumption of invention which attaches to a patent. Its simplicity should not blind us as to its character. Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and, 'in the light of the accomplished result,' it is often a matter of wonder how they so long 'eluded the search of the discoverer and set at defiance the speculations of inventive genius.' Pearl v. Ocean Mills, 2 Bann. and Ard. 469, Fed. Cas. No. 10,876, 11 Off. Gaz. 2. *Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any,* and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of

> the world was always ready at hand and easy to be seen by a merely skilful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not."
>
> Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 55 L. Ed. 527-531.

> "Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit."
>
> Webster Loomis Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. at 1181.

We submit that this court is not going to decide this case upon mere speculation. Like any other law suit, the case is to be determined upon proofs. The proofs here are that the Wright invention comprises a new combination of elements and serves a new function not met by any prior patent or device. The fact that between the issuance and production of the prior patents and devices (Crompton 1893, Capek 1893, Simplex 1904) and the Wright invention in 1915, no one derived from the prior art the Wright invention demonstrates that it was not obvious. Mr. Wright created a new combination of elements providing a new and useful device. It would be manifestly unjust to revoke the protection granted him for his creation on the ground that for twenty years prior thereto somebody *might* have had the same conception.

"Like a jewel lost in a crowded thoroughfare, —multitudes pass it unnoticed, some actually tread upon it, others stop and gaze for a moment, but hurry on deeming it some worthless tinsel; at last comes one who recognizes its value and picks it up. Others might have done this, it is true, but they did not; he did, and is entitled to the prize which he has rescued from the mire. If one should attempt to snatch the gem from the finder on the ground that he passed it frequently and could have picked it up as well as not, he would in all probability be promptly turned over to the police as a thief or a lunatic. It is this capacity for accomplishing results, this faculty of seeing what others fail to see and hearing what others fail to hear which has always distinguished success from failure and the inventor from the mechanic."

George Frost Co. v. Cohn, 112 Fed. 1009.

The Defendant's Device.

The interlocutory decree herein adjudges:

"That the defendant has infringed claims 6, 7, 8 and 9 of said letters patent by selling devices like Plaintiff's Exhibit 2 herein." [Rec. p. 178.] It is stipulated that defendant sold Plaintiff's Exhibit 2 subsequent to the issuance of the patent in suit. Before passing to a discussion of infringement of the patent by Exhibit 2 we will discuss the construction and operation thereof.

An inspection of the infringing waffle iron, Exhibit 2, shows at once that the same is constructed with

a pair of casings. These casings are pivotally connected together by a pair of hinges. This much is admitted and Mr. Lamb has so testified:

"XQ. 130. Now, the waffle irons manufactured and sold for your company include a pair of casings pivotally connected together, do they not? A. They do." [Rec. p. 56.]

An aluminum waffle baking member is mounted in each of the said casings. This is also admitted, for Mr. Lamb testifies:

"XQ. 131. And each of them includes a waffle member provided with aluminum baking surfaces mounted on each of those casings, do they not?

A. They do." [Rec. p. 56.]

These aluminum waffle members are formed with flanges so that each of them covers the upper edge of its respective casing. There can be no dispute as to this, and Mr. Lamb testifies:

"XQ. 132. And those aluminum baking surfaces are so formed that each of them covers the upper edge of their respective casings, do they not?

A. They do." [Rec. p. 56.]

An electric heating element is annexed to the underside of each of the waffle-baking members in the infringing device. Appellant has questioned whether or not it can be said that this electric heating element is mounted in the casing between the casing and the waffle member. It is perfectly obvious that the element is in fact surrounded by the casing and is between the waffle member and the casing. Is that enough

to be included within the term "mounted" in the casing? Appellant asserts that to be thus "mounted" the heating element must be held up directly from the bottom of the casing, and points to the fact that in the Wright device the heating element n^2 is held up adjacent to the underside of the waffle-baking member by a layer of insulating material n^1 which is laid on the bottom of the casing. The Standard Dictionary defines "mounted" as:

"Equipped or furnished with suitable requisites."

We submit that, whether the heating element be maintained in the casing by affixing it to the underside of the waffle member or by supporting it on a layer of insulating material laid on the bottom of the casing, the heating element is *mounted in the casing.* In any event the difference is a mere mechanical detail and one manner is the obvious equivalent of the other. Both methods were alternately used in the art for years before the Wright invention. The Capek patent, issued in 1893, illustrates in figures 1 and 7 electric heating elements affixed to the underside of a cooking surface within a casing. As early as 1893 it was common in the art to refer to such affixing or suspending as "mounting," for in the Capek patent it is thus described:

"Fig. 2 is a bottom view of the vessel on which the heater proper is mounted." [Rec. 268, lines 21-23.]

In defendant's device there is a non-conducting or insulating element spacing the electric heating element from the casing. This non-conducting element in Exhibit 2 consists of isinglass or mica. This isinglass or mica consists of two pads positioned one on each side of the electric heating element. These pads insulate the heating element from the casing and waffle baking surface. The heating element and insulating pads are secured in position by a metal plate. This metal plate is directly suspended from the waffle baking member, but is primarily supported by the casing as the casing supports the baking member. One part is spaced from another part electrically when it is insulated therefrom. The mica pads in combination with the plate insulate and separate the electric heating element from the casing. When carefully considered it will be found that Exhibit 2 and the Wright patent disclose means for mounting and insulating the electric heating elements which perform the same function in substantially the same manner. In both devices the elements are, in fact, supported in the casing by the casing. Both manners of supporting the element are properly in the art described as "mounting." In patent law, names of things are not controlling and as they function identically they are regarded as equivalent or identical.

The operation of defendant's device, Exhibit 2, is the same as that of the Wright invention expressed in the claims in suit and as embodied in Exhibits 3 or 6. The electrical heating elements being adjacent

the undersides of the aluminum waffle baking members pass their heat directly into said members. The latter being of aluminum efficiently and immediately pass the heat to the waffle batter. Because of the low heat conductivity of the thin steel casings compared to the aluminum cooking members practically all the heat will be passed to the waffle batter and only an inconsequential proportion radiated and dissipated. Thereby Exhibit 2 may be operated on a house current. The baking surfaces being of aluminum, grease is unnecessary if the iron be properly handled. The aluminum flanges support the baking members on the casings, relieving the screws of the majority of that duty, insure that the batter and waffle will not adhere to the edges of the casings, and prevent the batter from penetrating inside the casings and disturbing the heating elements or insulation.

It is clear in view of the above that defendant's infringing device embodies each and all of the elements and advantages embodied in Mr. Wright's generic conception of the fundamental combination of elements adapted to provide an electrically heated waffle iron for table use.

Infringement.

Having pointed out the features which are possessed alike by the Wright invention and by the infringing device let us now consider whether in incorporating those features defendant has made use of the invention covered by claims 6-9 of the patent in suit. This

question may be much simplified by remembering that it is not the drawing or the specification of the patent in suit that may or may not be infringed. It is the claims that are to be considered.

> "Strictly speaking, infringement of a patent is an erroneous phrase; what is infringed is a claim, which is the definition of invention, and it is the claim which is the cause of action."
>
> Fulton Co. v. Powers Regulator Co., 263 Fed. 578 at 580 (C. C. A. 2d.).

We have heretofore pointed out the generic character of claims 6-9 as distinguished from specific claims 1-5. The latter purport to cover the specific form illustrated in the drawing and are limited to the application of the Wright waffle iron to an electric grill. Claims 6-9, on the other hand, make no mention of a grill and are not limited thereto. The issue of infringement here is whether or not defendant infringes either or all of claims 6-9. The trial court held that claims 6-9 read precisely on defendant's device and that defendant's device was precisely the same as everything recited in such claims.

"The defendant's device being in every way the same as that *claimed* by the plaintiff in his last four claims, the mere difference in the construction of the electrical appliance or attachment as above stated does not avoid infringement." [Rec. 176.]

We shall first consider claim 6 and thereafter take up claims 7-9 in so far as they differ from claim 6. Claim 6 reads as follows:

"6. In a device of the class described, a pair of casings pivotally connected together, a waffle member provided with an aluminum baking surface mounted in each of said casings so that each of said aluminum baking surfaces covers the upper edge of one of said casings, and means mounted in said casings between said casings and said waffle members for electrically heating said waffle members."

It is apparent from the study of this claim that it covers, in combination, precisely those features which are common to the specific embodiment of the Wright invention illustrated in the patent drawings, to the specific embodiment of the Wright invention presented by Plaintiff's Exhibits 3 and 6, and to the infringing device, Plaintiff's Exhibit 2. The same identical elements are present in each of these expressions or embodiments of Mr. Wright's invention *as defined in claim 6.*

For example starting with the first element of claim 6 "a pair of casings pivotally connected together," these clearly appear in figure 1 of the Wright patent drawings. As before stated, Mr. Lamb admits their presence in the infringing device. [Rec. p. 56.] The next element in claim 6 is "a waffle member provided with an aluminum baking surface mounted in each of said casings." These members are illustrated as b-c in the Wright patent drawings and Mr. Lamb admits they are present in the infringing device. [Rec. p. 56.] Claim 6 next provides "that each of said aluminum baking surfaces covers the upper edge of one of said

casings." These flanges are clearly illustrated in figure 1 of the Wright patent (see n^5) and Mr. Lamb admits that they are also employed in the infringing device. [Rec. p. 56.] The other and last element of claim 6 is defined therein as "means mounted in said casings between said casings and said waffle members for electrically heating said waffle members." This refers to the electric heating elements n^2 in the Wright patent drawings. We have heretofore pointed out that the infringing device has electric heating element supported by metal plates adjacent the underside of the waffle members and that within the proper lexicography of the art such support is properly termed mounted within the casing.

We find, therefore, in the infringing device in combination each and every element of claim 6. Each element in the infringing device performs the same function in the same manner as in the Wright invention. Claim 6 describes defendant's infringing device with absolute accuracy.

> "The infringement of a combination-patent therefore, consists in the manufacture, use, or sale of any combination in which precisely the same elements or their equivalents are united under the same co-operative law."
>
> III Robinson on Patents, Sec. 922.

> "Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the

same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape."

Machine Co. v. Murphy, 97 N. S. 120, 24 L. Ed. 935-936.

Claim 7 differs from claim 6 in two respects. Whereas claim 6 states "that each of said aluminum baking surfaces covers the upper edge of one of said casings," claim 7 provides that the aluminum baking members shall "extend past the edges of said casings." We have heretofore pointed out the threefold purpose of such extension or flange, to support the baking member, to prevent the batter from adhering to the edge of the casing, and to prevent batter from penetrating the casing. Appellant urges that the wording of claim 7 requires that the flange shall *more* than cover the edges of the casings. This would be totally useless and such a construction should not be adopted if the phrase is open to another meaning. If the phrase read "extend past the *outer* edges of the casings" appellant might be right but it does not so read. The phrase is equivalent to stating—extend over or overlap the edge,—i. e., cover the edge. The wording of claim 7 obviously refers to a flange adapted to perform the three-fold function above set forth. The flanges on the waffle members in the infringing device perform every function involved just as do those in the Wright device and that is sufficient to constitute infringement under every rule of Patent Law. Claim

7 adds to claim 6 "a non-conducting element spacing said electrical heating element from said casing." We have heretofore shown that the infringing device has an isingless or mica pad held up by a metal plate thereby spacing and/or insulating the heating element from the casing. Claim 7, therefore, applies precisely to the infringing device and like claim 6 is clearly infringed by Plaintiff's Exhibit 2.

Claim 8 differs from claim 6 by adding that the casings are "box-shaped" and connected "so as to fold one upon the other." The casings employed in defendant's infringing device are box-shaped and fold one upon the other. Claim 8 also adds to claim 6 a statement to effect that each of the waffle members is provided with an outwardly extending flange "whereby said waffle members are supported on the edge of said casing and spaced apart from the bottom thereof." This is merely a clause describing one function performed by the aluminum flange and the infringing device utilizes such flange precisely as in the Wright invention. Every element of claim 8 is found precisely duplicated in the infringing device.

Claim 9 is identical with claim 8 except that claim 9 defines the electrical heating means in the same manner as does claim 7. Claim 9, therefore, describes exactly the combination of elements found in defendant's device.

The case, therefore, presents the situation of the infringing device embodying element for element the

combination recited in each of claims 6-9 in suit. In the infringing device each element performs the identical function in the same way as the corresponding element of the claims. The claims are the definition of the invention covered by the patent. Clear infringement of claims 6-9 appearing, it follows that defendant has infringed the patent as decreed. As has been recently said by the Supreme Court, referring to the claims of a patent:

> "It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute." (Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 510, 61 L. Ed. 871.)

Notwithstanding the fact that claims 6-9 find their exact counterpart in the infringing device appellant strenuously urges that the patent in suit is not infringed. Under subdivisions (a) (f) beginning at page 21 of its brief appellant has presented certain propositions in an effort to support its assertion of non-infringement. We believe the trial court's conclusion to the effect that defendant's device is "in every way the same as that claimed by the plaintiff in his last four claims" is obviously correct, but we will proceed to answer the matters asserted by appellant in the order presented in its brief.

(a) Under the assertion that the claims should be construed with regard to the drawings and specification of the patent in suit appellant endeavors to have this court discard the claims and adopt the drawing and specifications of the patent as defining the metes and bounds of the monopoly conferred thereby. This is not a proper application of the rule advanced by appellant. It is permissible to refer to the specification and drawings to ascertain the meaning of a phrase in a claim, but the claim is the definition of the monopoly. Otherwise a patent could only cover the single embodiment of the inventor's conception. There would be no object in having claims in patents. The specification under the law sets forth one embodiment of the invention. The claims are to define that invention in whatever concrete form expressed. As said in National Tube Co. v. Marks, 216 Fed. 507 at 515 (C. C. A. 6th):

> "The claims are part of the description required by statute, and in them, and not in that part of the description which is now commonly called 'specification,' is the proper place in which to define the breadth of the invention, as was most accurately apprehended by Fell's solicitor when he (though quite unnecessarily) said that various changes might be made 'without departing from my invention as defined by the appended claims.' "

In Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 L. Ed. 1122 at 1128 the Supreme Court states:

"In other words, he filed a description of his invention, explained its principle, and the best mode in which he 'contemplated applying that principle' and did not intend to give up all other modes of application. An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. 'The principle of the invention is a unit, and invariable; the modes of its embodiment in the concrete invention may be numerous and in appearance very different from each other.' 2 Robinson, Patents §485. The invention, of course, must be described and the mode of putting into practical use, *but the claims measure the invention.*"

We have heretofore shown that the claims are not limited to the particular manner in which the heating elements are positioned within the casings. The lengthy dissertation indulged in by appellant on the use by Wright of the casings as a box and the use by appellant of the casings to "screen or cover" the heating elements and associated parts resolves simply into the fact that appellant holds the heating element up by a metal plate annexed to the sides of the casing and Wright holds the heating element up by a layer of insulation positioned in the casing. No difference in function results. In both constructions the casing encloses the element and through the metal plate in one case and through the insulating layer in the other maintains the heating element adjacent the cooking

surface. The whole matter is one of the most immaterial of mechanical details. So far as infringement is concerned the distinction is inconsequential because the claims in suit make no mention of such mere detail.

> "Bearing in mind that there is *nothing in the claim* limiting it to a straight wall or to round tenons or straight tenons, we are of the opinion *that infringement has been established.*"
>
> Sanitary Fireproofing & Contracting Co. v. Sprickerhoff, 139 Fed. 801 at 804 (C. C. A. 2d).

We have heretofore shown the falsity of the contention that the Wright invention is inoperative unless the casings be pivotally connected together through a grill member. This is based on the false theory that the Wright invention can only be embodied in the composite grill device illustrated in the patent drawings. Plaintiff's Exhibits 3 and 6 entirely disprove such contention. In fact so far as being adapted for baking waffles is concerned, it makes no difference if the casings be directly hinged together in the composite device. Appellant's attempt to limit claims 6-9 to a device having a grill member is contrary to well-settled law. Since these claims do not mention the grill member the claims cannot be construed under the law to include the same:

> "The rules applicable to the construction of these claims in this regard are, first, that *we cannot read into a claim for a combination an ele-*

> *in the specification;* and, secondly, that if the claim includes an element in general terms, and refers to the specification to identify it, we may read that element into the claims—a rule of construction applicable to all written instruments; and, thirdly, that *where the applicant for a patent in one claim makes no mention of an element, and in another includes it, the presumption is that he omitted it in the first on purpose."*
>
> Duncan v. Cincinnati Butcher Supply Co., 171 Fed. 656 at 663 (C. C. A. 6th).

In Mast Foos & Co. v. Dempster Mill Manufacturing Co., 82 Fed. 327 at 333 (C. C. A. 8th) the court applied the same rule as follows:

> "There is not an element in this combination which is not found in the windmill of the appellee, and it cannot be permitted to read other elements into this claim, and then to defeat it, because it does not use the elements it interpolates."

Claims 1-5 of the Wright patent include the grill member and it was the special office of those claims to protect the specific form of the Wright invention employing the grill member. The grill member was purposely omitted from claims 6-9 in suit so that the latter claims might cover other specific forms in which the Wright invention may be embodied and particularly devices like Plaintiff's Exhibits 3 and 6. It would render claims 6-9 mere duplicates of claims 1-5 to restrict the former to the grill member. It is well established that generic claims will not be restricted

to features set forth in specific claims of the same patent. In Los Angeles Art Organ Co. v. Aeolian Co., 143 Fed. 880, at 885, this court said:

> *"The claims of a patent should be construed, where they reasonably may be, to cover the entire invention of the patentee;* and where a patent contains several claims, some of which are limited to details, *the others are, prima facie, not to be restricted by insisting that they contain, as necessary elements, the particulars which are specifically covered elsewhere.* The general rule is, as stated by the court in Risdon I. and L. Works v. Trent, 92 Fed. 375, 388, that *'Infringement cannot be avoided by reading into a broad claim of a patent specific devices claimed in narrower claims of the patent'"*

(b) Appellant next urges that the fact that defendant's device performs the same function or effect as that of plaintiff does not establish infringement, but that such effect must be produced "by substantially the same mode of operation." As appellant does not attempt to show wherein the mode of operation of the infringing device in any manner differs from that of the Wright invention as defined in claims 6-9 in suit, we fail to perceive the pertinency of the reference. The effect produced or function performed by both devices is to bake waffles on a house current in a manner fitting the device for table use. This is made possible in both defendant's and plaintiff's devices by an identical combination of elements. These elements co-act in the same manner in each of the

devices. There is identity of elements and mode of operation and this identity makes possible identity of function.

(c) Under this subdivision appellant reargues its contention that the Wright casings are utilized as "boxes" for a different purpose than that performed by the casings in the infringing device. We have heretofore pointed out that claims 6-9 are not in any manner limited to such mere mechanical detail. There is absolutely nothing of substance in the distinction. In each of the devices the casings support the waffle members and enable the same to be folded upon each other for the baking operation. In each of the devices the casings enclose and protect the heating elements and insulation. The advantages and benefits of the Wright invention as defined in claims 6-9 have all been taken by defendant in its device.

Williams v. Kaufmann, 259 Fed. 859 at 863 (C. C. A. 9th).

Appellant urges at page 26 of its brief that the claims should be narrowly construed on the ground that the Wright invention ranks as an improvement over the prior art. The decree of the trial court is in entire harmony with the rule. The trial court expressly ruled that "the claims should be narrowly construed." [Rec. p. 174.] We do not ask that this court grant to claims 6-9 any broad range of equivalents. The scope of those claims is not an issue in this case because as found by the trial court defend-

ant's device is "in every way the same as that claimed by the plaintiff in his last four claims." [Rec. p. 176.] Where an invention has been bodily appropriated as in this case, the court will protect the patentee whether the invention be broad or narrow. It is no answer for one who has taken element for element of an invention, as defined in the claims in suit, to assert that the invention is narrow. If the invention is narrow there is less excuse for infringement because it should be relatively simple to find something else. The trial court perceived this fact and stated herein:

"Now, if the defendant is of the opinion that these boxes are but a finishing, a screen or cover, it seems to the court that the defendant might devise something else." [Rec. p. 176.]

The Circuit Court of Appeals for the Second Circuit in Rajah Auto Supply Co. v. Emil Grossman Co., 188 Fed. 74, said:

> "The invention is, of course, a narrow one, but it belongs to that large class where the courts have sustained improvements over the prior art, which produce a new and beneficial result that materially advances the art to which they belong. When a defendant persists in using such an improvement in preference to prior devices which he insists are equally efficacious, he tacitly concedes its superiority. It is difficult to reconcile his persistent use, even though it involves him in an infringement suit, with the contention that other devices which he is free to use are equally good."

(d) Beginning at page 26 of its brief appellant refers to the rule that the fact that two devices perform the same result does not establish infringement. This is a mere restatement of the matter discussed by appellant under section (b). We have heretofore shown that the similarity between the infringing and plaintiff's devices is not confined to similarity of function or result. Defendant's device is adapted to perform the novel function of the Wright invention by employing in identical combination each and every element and attribute of plaintiff's invention as defined in claims 6-9 in suit.

(e) Under a heading "The prior art demonstrates non-infringement" and beginning at page 29 of its brief appellant again reverts to the fallacious proposition that the patent in suit should be restricted by a hypothetical device mentally organized by a combination and reorganization of prior patents and devices. We have heretofore referred to the fact that such a contention has been oft repudiated by this count and by innumerable other courts including the Supreme Court of the United States.

At page 18 of its brief appellant alleges that Landers, Frary & Clark developed the infringing device without knowledge of the Wright patent and quotes from the oral testimony of Mr. Lamb. The quoted answer of Mr. Lamb appearing at page 59 of the record was properly stricken out by the trial court. [Rec. p. 151.] The other quoted matter was properly objected to.

assertion. It is elementary that matters of asserted dates of production of devices in issue must be definitely established. No effort was made to prove the fact. Admittedly the infringing device was developed after the Wright patent was of public record. Defendant's intent is immaterial:

> "To constitute an infringement of a patent, it is not necessary that the infringer should have known of the existence of the patent at the time he infringed it."
>
> Walker on Patents (5th Ed.), page 464.

(f) Appellant contends there is no infringement because the negotiations with the Patent Office for the patent in suit "forces upon the claims limitations not included in defendant's device."

We have already pointed out that defendant's device presents exactly the combination as defined in claims 6-9, respectively. This is not a case where to make out an infringement the patentee must seek such an interpretation of the patent claim *as granted* as will make such claim cover the same scope as defined in a claim presented, disallowed and withdrawn during the preliminary negotiations settling the terms of the grant. Using the example selected by appellant—claim 7 presented, disallowed and cancelled, defined the invention as "a pair of waffle members pivotally connected together and means for electrically heating each of said pair." Merely applying an electric heating element *in any manner* to each of the pans of the old well known Griswold waffle iron of commerce would

respond to such a definition. Correctly the Patent Office held [Tr. Rec. p. 294]: "The application to a waffle iron of an electric heater is not considered patentable broadly" etc. Appellee then defined his invention as set forth in claims 6-9 whereupon the application was allowed.

Appellant has not merely applied an electric heater to a waffle iron. On the contrary appellant has (as defined in claim 6) provided a pair of casings pivotally connected together, mounted in each of said casings a waffle member provided with an aluminum baking surface, extending such surfaces so that they cover the upper edges of the casings, and then mounted in the casings electric heating elements between the bottoms of the casings and the waffle members. Such a comparison demonstrates that appellant's contention is not within the rule of law asserted by appellant and a discussion of such asserted rule becomes moot. Appellant is condemned as an infringer by the very terms of the claim as granted. There is no attempt on the part of appellee to, and the District Court did not, "claim the benefit of his (appellee's) rejected claims, *or such a construction of his present claim* as would be equivalent thereto." (Italics Appellant's Brief, p. 35.)

The rule of law referred to by appellant does not fit the case. It is common knowledge that changes in the claims must be made and are always made during the negotiations with the Patent Office. The

is simply that no subsequently granted claim can be interpreted to have the identical scope of a rejected withdrawn claim.

National Hollow B. B. Co. v. International Co., 106 Fed. 693 at 714;

Weber Elec. Co. v. Union Elec. Co., 226 Fed. 482, 485;

Wayne Mfg. Co. v. Benbow Brammer Mfg. Co., 168 Fed. 271;

National Tube Co. v. Mark, 216 Fed. 507.

The true rule is expressed by Circuit Judge Sanborn in J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259 at page 268 (C. C. A. 8th):

> "If a patentee acquiesces in the rejection of his claim on references, he may be estopped to maintain that an amended claim covers the combinations shown in those references, or that it has the breadth of the rejected claim, *but he is not estopped from claiming and securing by the amended claim every improvement and combination which he has invented* and which was not disclosed by those references."

Appellee acquiesced in the ruling of the Patent Office that merely to apply an electric heating element to each of the well-known pans of the old waffle iron did not amount to invention. But appellee did assert and "claim" and the Patent Office granted that appellee's invention embraced the pair of pivoted casings in which the waffle members were mounted with their aluminum baking surfaces extended to cover the upper

edges of the casings, and the mounting within these casings of the electric heating elements. The distinction between merely (in any manner whatever, without specifying any manner) applying electric heating elements to the pans of the well-known waffle iron and the use of the pivoted casings, mounting of the waffle members therein, etc., of claims 6-9 is plain. Yet appellant has used the precise combination of pivoted casings, waffle members mounted therein, etc., of these claims.

It is claims 6-9 *as granted* that appellant infringes. Since appellant infringes these claims *as granted* it can gain no advantage from the fact that during the negotiations for the patent other and *different* claims were disallowed and withdrawn.

At page 50 of its brief appellant urges that the lack of commercial exploitation of the Wright invention by plaintiff is a factor to be considered. It is established that the Wright invention is successful in operation. As embodied in the waffle iron *per se,* Plaintiff's Exhibits 3 and 6, the Wright invention was successfully used from 1915 to the date of the trial hereof. [Rec. pp. 75, 80, 104.] As embodied in the composite device Plaintiff's Exhibit 5 it was also successfully used. [Rec. p. 79.]

It is established by the record that the reason plaintiff has not more extensively marketed his invention is due to no defect therein. Plaintiff organized a corporation to manufacture devices embodying his invention and had secured a factory site and ordered

some material, but just as the plans were complete the principal financial backer very suddenly died. This delayed the proposition pending a settlement of the deceased man's estate and interest. Matters had been arranged to start up again when the infringing device was brought out on the market and before plaintiff could proceed it was necessary for him to protect the grant given him by the patent in suit. Upon settlement of this suit plaintiff and those interested with him stand ready to proceed. [Rec. pp. 86-88.] Manifestly, it would be unjust to permit this delay to militate against plaintiff when it is brought about by defendant's continued infringement. Mr. Wright's testimony is corroborated by an assignment from him to Quince C. Crane [Rec. 220]; by an assignment from Wright & Crane to Crane & Wright Electric Company [Rec. 222] and by an assignment from Crane & Wright Electric Company by Wright & Mark, trustees, to plaintiff. [Rec. p. 225.] The latter assignment was made pursuant to section 13 of Act 756 of the General Laws of California. Wright and Mark being the surviving directors became the trustees pursuant to said Act for the defunct corporation. [Rec. pp. 88-95.]

The commercial value of the Wright invention is established by the defendant's verified statement showing sales of 1120 infringing waffle irons [Rec. p. 193] and by defendant filing a bond for $8,960.00 to continue selling the same pending this appeal. [Rec. p. 196.]

In any event:

> "The validity of the patents is not affected by nonuser of the patented devices, if they have utility in the sense of being capable of successful mechanical operation. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Lewis Machine Co. v. Premium Mfg. Co., 163 Fed. 954, 90 C. C. A. 310 (Reed v. Hughes Tool Co., 261 Fed. 192 at 194 C. C. A. 5th)."

Conclusion.

Appellant asks what is the advance made by plaintiff over the prior art. This advance is defined by claims 6-9 in suit. These claims are for a novel combination of elements. This combination gives to the art for the first time an electrically heated waffle iron adapted for table use. This combination is not found in any prior patent or device. It is this precise combination that defendant has appropriated in the infringing device.

This suit presents the not unusual situation of a defendant giving the tribute of its praise to the prior art but, to the plaintiff's patented invention, the tribute of its imitation.

As said by the Supreme Court, in the case of Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 441:

> *"The prior art was open to the rubber company.* That 'art was crowded,' it says, 'with numerous

> they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the rubber company uses the Grant tire. *It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation; as others have done.* And yet the narrowness of the claims seemed to make legal evasion easy. Why, then, was there not evasion by a variation of the details of the patented arrangement? *Business interests urged to it as much as to infringement.* We can find no answer except that given by the tire company: 'The patented organization must be one that is essential.'"

We submit that the decree below enjoining appellant from continuing to sell waffle irons like Plaintiff's Exhibit 2 herein was according to law, according to equity and good conscience, and in accordance with the facts, and should be affirmed.

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LEONARD S. LYON,
Solicitors and Counsel for Appellee.

No. 3715

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pacific States Electric Company,
Appellant,

vs.

William D. Wright,
Appellee.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

The court at the time of argument of this appeal having granted appellant permission to file a reply brief, within thirty days, the following rejoinder is made to the brief of appellee, and to the oral argument made by appellee in connection therewith.

Woven throughout both the brief and oral argument of appellee, and interwoven with outright misleading statements and references, particularly in the brief, are found two pre-eminent fallacies which may be briefly stated as follows:

First, that claims 6 to 9 inclusive of the Wright patent in suit stand in a generic relation to claims 1 to

5 of that patent, so that, as urged, appellant's device, while not falling within the last mentioned or specific claims, does fall within the first mentioned or generic claims; and,

Second, that in order to establish a defense of anticipation or want of invention as applying to claims 6 to 9 in suit (~~even~~ so far as attempt at bringing appellant's device within them is concerned), a reorganization of the prior art devices and patented things must be indulged in.

Within the brief time permitted after service of appellee's brief, preparation was made for a partial preliminary attack upon these fallacies by argument. Likewise, in appellant's opening brief, an anticipatory discussion of the second named fallacy was developed to some extent, it having been expected that appellee would resort to that particular line of attack upon the defenses presented. The first named fallacy appellant had not believed appellee could urge seriously or at all, and more particularly because of the clear finding of the trial court (with its only possible ultimate meaning), in the memorandum opinion at Tr. 174, "that the claims should be narrowly construed and should be limited to the precise machine described."

We shall deal with these fallacious contentions of appellee with some further particularity in this brief, and likewise again call Your Honors' attention to the significant bearing upon the contentions of appellee with respect to the alleged scope of claims 6 to 9, of

the search made by the patentee Wright prior to the filing of his application for the patent in suit. This search letter is found at Tr. 215, the sketch referred to therein being reproduced, Tr. 217. As we pointed out on argument, the record is silent and makes no disclosure as to any response to this search letter or to any results predicated thereon.

Again, at this point, we repeat, that as the file wrapper and contents of the Wright patent in suit [Tr. 271, *et seq.*] establishes the fact that the Patent Office did not discover the Simplex electrically heated waffle iron or the Griswold waffle iron with aluminum baking surfaces, or the British Crompton patent, the Wright patent, and particularly claims 6 to 9 thereof, are to be subjected to grave doubt as to validity, for the novelty of the subjects thereof was not tested out in the light of these pertinent and closely fitting prior devices. Obviously, the usual presumption of validity otherwise attaching to these claims 6 to 9 in suit, is entirely dissipated by this oversight on the part of the Patent Office, and Your Honors must perforce consider *de novo* the questions of novelty and validity of the subjects of these claims.

And in this connection, we earnestly offer the suggestion *that the reason Wright did not incorporate in his original application any claims directed to a structure devoid of a base or foundation or grill member or support member* [and he did not, as see Tr. 283-285] was because the response (undisclosed) to

the search letter, of December 9, 1915, *supra,* apprised him of the existence in the art of the Crompton British patent, at least, and likely of the Simplex and Griswold devices, all in evidence. When, however, the Patent Office failed to cite either of these prior devices, or the Crompton patent device, Wright evidently bethought himself of the possibility of injecting claims (to be construed in accordance with the law of operation of the three-membered device pictured and described in his drawings and specification) and directed at *details of structure*, but not *reciting* the grill or foundation or base member. So he put in claims of this sort, finally obtaining claims 6 to 9, subject, however, to the examiner's statement in official letter of May 31, 1916, Tr. 294, that:

"The application to a waffle iron of an electric heater is not considered patentable broadly, though the specific subject-matter of claims 1 to 5 appears to be patentable. * * *"

As pointed out in our opening brief, Wright accepted this limited view of the invention and his claims therefor, expressed by the Patent Office, and in his response or amendment [Tr. 297] concedes that "applicant's claims are not drawn broadly, but are specific to the structure."

If the claims in suit, or any claim that could be drawn in this patent, were valid at all, it needs must be so only as most specific to the structure, and, assuming the claims in suit represented any inventive act in Wright, the lower court was quite correct in stating,

(as far as the court went), as *supra*, in the memorandum opinion, "that the claims should be narrowly construed and should be limited to the precise machine described" [Tr. 174].

It is not shown in either specification or drawing that Wirght at any time asserted to the Patent Office or published to the world upon the issuance of his patent, any contention or claim for recognition as to any invention other than that which contemplated the employment of "the base or grill member a" [quoting from Wright patent, Tr. 211, first column, line 49] and the employment and inclusion of, at least, the frame or support thereof, to which the two waffle members b and c are separately pivotally joined, and to which base or grill member or the frame thereof said waffle members must of necessity be separately pivotally joined, so that the waffle member b may perform its evolutions, and the complete device may perform in accordance with its closely portrayed law of operation.

In accordance with the clearly established practice in the Patent Office, had Wright intended, or had the Patent Office considered he intended or was attempting to patent any generic combination in and by claims 6 to 9, the same being devoid of limitation to and inclusion of the base or grill member a, we should expect to find some illustration or description, and more properly both, of such essentially different specific form and organization, rather than to find no disclosure whatsoever from which to spell out a structure with such totally different law of operation, as appellee contends for claims 6 to 9.

All Wright's Claims Clearly for One Particular Device.

The law of operation of appellant's device, (which appellee says is within what he calls "generic" claims 6 to 9), with its two casings directly hinged together, as we urged before Your Honors on oral argument, *is abhorent to the law of operation taught in the Wright patent,* for the device so disclosed in the specification and drawings *could not operate if the lower waffle member b and the upper waffle member c were directly hinged together.* In such case the lower waffle member b could not be swung outwardly beyond the base or grill member a and inverted, and returned over the base member a, as unequivocally called for by the Wright patent.

Can it be that the Wright patent can cover, or be held to disclose or claim, a combination of elements and features (such as in appellant's device), the organization of which is so totally repugnant in mode of operation and action to the clear teaching of the Wright patent? We are perforce constrained, of necessity, and for reasons of mechanical consistency and immutability to conclude that Wright never intended any claim in his patent to be construed so as to include and cover any such device as that of appellant, and that certainly the Patent Office in issuing the patent in suit did not intend to grant and in fact did not grant to Wright any such abortive monopoly. Patents are contracts between the government and the inventor, as,

however, affecting directly the people at large, and are to be construed in the light of the entire contract, and the claims are to be particularly and jealously construed, in order that the public be not prejudiced and embarrassed by interference with industrial pursuits that lie wholly outside of the plain meaning and intent of the contract. No innocent third party (a member of the public) should be held as a tort feasor for violation of any such contract, obtained *ex parte* unless guilt clearly appears.

It is elementary that the claims must be construed in the light of the specification and drawings, and cannot be given a forced and strained interpretation, which disjoints them from the description and drawings and sets them apart for astute construction to fit the exigencies of an instant litigation.

What we must seek to determine here, in addition to what it was possible for the inventor to add to the art, is what he *actually patented* as an addition to the art. He certainly cannot be legally or equitably held to have patented something that lies without the controlling and solely disclosed and essential mode of operation of the invention, and anything which has a fundamentally different, and, as in this case, a conflicting law of operation, certainly cannot come within the purview of the patent or be an infringement thereof. The factor of operation is as essential as construction in considering what a patent covers. (See appellant's opening brief, page 24 and 26, cases cited.)

Therefore, we contend it clearly to have been demonstrated that claims 1 to 5 of the patent in suit cannot properly be considered, as appellee would have it, as addressed to a *species* falling within a *genus* said to be claimed in and by claims 6 to 9. Webster's International Dictionary defines a genus as "a class of objects divided into several subordinate species;" or, "a precisely defined and exactly divided class;" and also defines a species as "in science, a more or less permanent group of existing things or beings, associated according to attributes, or properties determined by scientific observation." A further definition of species is given, that it is "a conception subordinated to another conception, called a genus, or generic conception, from which it differs in containing or comprehending more attributes, and extending to fewer individuals." It obviously does violence to any genus definition to attempt to bring into it and into its "generic conception" any species, the "attributes" of which are so contrary in nature to the "generic conception" that the necessary action or performance of the genus would render the species useless. *To attempt to group specific things within a classification that would convert the specific things to objects of inutility, would introduce a mode and method of classification obviously as absurd as unhelpful, and utterly misleading.* A species to be of any use must be operative. To attempt to characterize it from a generic standpoint in such a manner as to render it inoperative must of necessity result in excluding it from the generic definition attempted.

And further and beyond all such speculation or demonstration, stands the finding of the trial court that the claims in suit "should be narrowly construed and should be limited to the precise machine described." With such limitation, the claims can mean but one thing—one exact thing—and that one exact thing, as the trial court says, must be the *precise machine described*. (Italics ours.) The precise thing described, as we have previously observed, must have been overlooked by the trial court, in construing claims 6 to 9 so as to include defendant's device with the two waffle members directly hinged together. The "precise machine described" is the precise machine disclosed in the drawings of the Wright patent, with its "base or grill member a," to which the lower and upper waffle members b and c are separately pivotally connected, and which in great detail, and without any alternative disclosure, is set forth and defined in the descriptive part of the specification. All of these three parts, the patentee says, are principal parts of his invention. He says, lines 48 to 50, column 1, Tr. 211:

"The principal parts of my invention are the base or grill member a, the lower waffle member b, and the upper waffille member c."

Eliminate any one of these and you destroy the entity of the invention, not only in structure but in necessary and required law of operation.

That a sub-combination claim (not present in the Wright patent) to be valid must be for an operative

combination in the construction or operation of the mechanism to which it relates, see *B. F. Slocomb & Co., Inc. v. Layman Machine Co.*, 227 F. 94, 104.

Says the court (p. 104—italics ours):

> "That a mechanical device literally falls within the language of a patent claim does not necessarily show that it is covered by the claim. And where the claim is for a combination to be valid *it must be for an operative combination,* and if an element essential to make it operative is shown and described in the patent description and drawings but is omitted from the claim, it must be read into the latter. Each of the parts whose co-operative action is necessary for the performance of the function of the mechanical combination claimed is an essential element of such combination and must have been employed without authority in connection with the rest before infringement can be found. *The facts here do not disclose the case of mere sub-combinations, each having its proper function in assisting to bring about the contemplated general result of the operation of the patented mechanism in its entirety and not so related to, or dependent upon the other parts or sub-combinations as to have its appropriate and distinctive function qualified or modified by their action.* * * * To constitute direct, in contradistinction to contributory, infringement of any combination claim relied on in the reissue patent, it is necessary that the defendant's mechanism should contain elements the same as, or equivalent to, *all the essential elements, whether expressed or implied,* in the combination claimed

> contained in the complainant's machine, *co-operating in substantially the same manner to perform its function.*" (Italics ours.)

The decision in the above Slocomb case was affirmed *on the opinion of the District Court,* by the U. S. Circuit Court of Appeals for the Third Circuit, as reported in 230 F. 1021.

See also *M'Caslin v. Link Belt Machinery Co.,* 139 F. 393. The head note is as follows:

> "Where a claim of a patent is for a combination, it must be for an operative combination; if an element essential to make it operative is shown and described in the specification but is omitted from the claim, it must be read into the claim."

In this case the device of the patent included a guard rail. Owing to the presence of the guard rail in the patented device, the court says that there is thereby supplied—

> "the means by which the result is attained, namely, the establishment of the overlap of safety * * * owing to the presence of the guard rail."

This case was affirmed by the U. S. C. C. A., Second Circuit, in 147 F. 243.

So it must follow that there is no relation of species and genus as between the subjects of claims 1 to 5 on the one hand and 6 to 9 on the other hand. Nor can there be two species. That would be abhorent to patent law, for a patent cannot cover two separate inven-

tions—two distinct things constructed differently and having different attributes and laws of operation. Therefore, "the precise machine described" must be represented in but one species, and that species must be the species pictured in the patent drawings and described in the specification, and having all the "principal parts" of the invention, including the base or grill or foundation member a, or its frame, to which the waffle members b and c are independently pivoted, and having a law of operation which *necessarily requires* such independent pivoting of said waffle members.

This attempt of appellee to straddle the defendant's device by an interpretation of claims 6 to 9 clearly abhorrent to the teaching of the entire patent, is unwarranted within all tenets and principles of patent law, contracts and logic, and flies directly in the face of the findings of the trial court, reduced to finality, that the claims should be narrowly construed and limited to the precise machine described. From the decree based upon this opinion appellee has not appealed. From what we deem error of the lower court in holding that appellant has used the "precise machine described," appellant has appealed. If the trial court was correct in its limitation of the Wright patent to the precise machine described, (and it can mean only one machine), with which finding, as we say, appellee cannot here take issue, appellee is certainly wrong in his submitting to this court that there can be anything further patented in and by the Wright patent than the

one species or specific thing described and patented in it. Furthermore, we have urged before Your Honors that we do not use the specific thing which claims 6 to 9 are urged by appellee to cover. In fact, the trial court admits differences where the memorandum opinion states:

"It is true as claimed by the defendant that its electrical attachment is fastened to the waffle-irons by screws instead of being contained in a box, but the plaintiff's device is attached to the waffle-irons, and necessarily so, but not in the same way." [Tr. 176.]

But we trust to have convinced Your Honors that a more fundamental and entirely controlling distinction between appellant's device and the Wright patent structure—for which the Wright patent was really issued, as to all its claims—consists in the absolute variance as to construction and law of operation between appellant's device with its two waffle members directly hinged together, and the Wright patent device with its base or grill member and two waffle members independently pivoted to the same. The distinction is more than obvious; it is mandatory. It excludes defendant's device entirely, both as to structure and mode of operation, from the teaching and monopoly of the Wright patent.

The artificial teaching and monopoly which appellee would lend to the Wright patent in attempting to make out a generic and specific relation between the two sets of claims, is a mere grasping at a straw, which straw, as a matter of fact, does not exist.

Wright nowhere in his patent specifies that his device, as pictured in the drawing and including the base or grill member, is a mere preferred form or example of his construction. He describes it as the only form. He cannot, even if the opinion of the lower court permitted, ask for a generic interpretation of claims 6 to 9 by attempting to base same on a description in the specification which is specifically limited to a single device, even if he does state in his patent, after describing but one form, that he deos not desire to be limited to details. He does not give any hint of any other form, either in drawings or description.

As said in *Excelsior Drum Works v. Sheip and Vandegrift, Inc.*, 173 Fed. 312:

> "The defendant's horn has a band of textile material, which is stretched and glued into a shallow groove that surrounds the horn near the large end, and to some extent this band reinforces or adds strength to the structure. It is therefore within the literal language of the third claim, and must be held to infringe unless the claim should be so limited by the specification taken as a whole and by the state of the prior art as to apply substantially only to such structure as the specification describes in detail. It is the "reinforcing band" that presents the problem here. Should that phrase be restricted to a band of veneering that substantially covers the surface of the horn between the two ends? Or may it be so construed as to cover a single narrow circular band such as the defendant's, on the ground that the cir-

cular band "reinforces" in some degree? If it were a merely ornamental band, it would certainly not infringe; but the language of the claim, standing by itself, lays hold upon any band as soon as it begins to add strength to the structure, even if the addition be very slight. In my opinion, the claim cannot be permitted to depart thus far from the specification. The description is wholly confined to a thin and narrow band "wound spirally from one end of the horn to the other." The drawings show this construction and no other, and there is not a word in the specification to indicate that the inventor is merely describing a preferred construction. I think it would be quite inadmissible, therefore, to construe the claim as broadly as the exigency of the complainant's case requires; and (without attempting to decide what would be a merely immaterial variation from the patented structure so as to expose the maker to the charge of infringement, or to decide precisely at what point the variation would become material so that the new structure would not infringe) I have no hesitation in holding that the defendant's horn has passed the point that separates the two kinds of variations, and does vary materially. For this reason I hold that it does not infringe.

"It is well settled that claims may be narrowed by limitations in the description (Walker, Patents, 4th Ed. p. 173, and cases cited), and, also, that specifications and drawings are usually looked at only for the purpose of better understanding the meaning of the claim (Howe Mach. Co. v. Nat. Needle Co., 134 U. S. 394, 10 Sup. Ct. 570, 33 L. Ed. 963). But whatever reciprocal effect

> the description and the claim may in general have upon each other, I do not understand that a broad claim can be based upon a description that is specifically limited to a single device, and does not present it as an example or a preferred structure. A possible explanation of the presence of the third claim is afforded by the file wrapper, which shows that the claim was inserted bodily after various rejections by the examiner, thus introducing the "reinforcing band" for the first time without anything in the description to support language so broad. As originally framed, the specification was drawn to sustain claims that referred only to "a thin narrow band spirally wound about said structure."

So in the case at bar, claims 6, 7, 8 and 9 aim, as interpreted by appellee, to cover something not disclosed, and in direct antithesis to what is disclosed, in a description "that is specifically limited to a single device," and that device is a device which of necessity must have the "principal parts," namely, the base or grill member and both lower and upper waffle members. There is no hint in the patent specification or drawing that any one of these can be eliminated in the practice of the invention. Furthermore, as in the last cited case, claims 6, 7, 8 and 9 were inserted "bodily after various rejections by the examiner," thus introducing the combination of a pair of casings pivotally connected together "for the first time without anything in the description to support language so broad."

Claims very much like claims 6, 7, 8 and 9, as, for instance, the cancelled claim 9, shown at Tr. 292, were

inserted and rejected prior to the insertion of present claims 6, 7, 8 and 9, but broader, and the patentee acquiesced in the rejection of these claims, by cancelling them, thus waiving any claim to the broad idea, that is, to the *pair of waffle members idea,* which, as above pointed out, the examiner virtually held was not applicant's invention when, at Tr. 294, he indicated that the specific subject matter of claims 1 to 5 was the patentable matter, such claims all containing the third or grill or support member. Clearly, the patent was issued with the direct understanding that this third member must be included as a necessary part of any claim, and this must be so to make any claim operative within the disclosure of the specification, for Wright, we repeat, admitted in presenting claims 6, 7, 8 and 9 in the following amendment, Tr. 297, that these claims "are specific to the structure." There was a meeting of minds between the Patent Office and Wright on this matter. Wright is bound by these transactions leading to the issuance of his patent, and particularly so inasmuch as the rule, as announced in *Thatcher v. Transit Const. Co.,* 228 F. 905, is that patentees are bound by their patents, but that the public is not, as patents are procured *ex parte.*

Nor was any change attempted to be made in the specification to introduce matter upon which might be predicated any interpretation of such language as is now urged here by appellee. Had it been attempted, the Patent Office would have branded it as new matter, and required Wright to file a further application if

he desired to patent such new matter. Aside from the limitation of these claims by the trial court to "the precise machine described" (which can mean only one thing) the interpretation urged for claims 6 to 9 is barred by the very specific nature of the *one form,* and its peculiar law of operation, of the disclosure of the description and drawings of the patent; and the absence of any *attempt* to broaden out the specification, when these claims were inserted, so as to lay a foundation for the interpretation thereof now urged by appellee.

Your Honors have recently handed down a prevailing decision which appears to us to be very applicable, in certain of its rulings, to the case at bar. We refer to *Western Well Works, Inc., et al. v. Layne & Bowler, Corporation Appeal No. 3627,* opinion filed October 17, 1921. In that case, it was contended by appellee that the patent in suit disclosed a closed shaft casing having the function of aligning the shaft. The opinion finds that this is not a part of the alleged invention of the claims sued under, and that there is nothing in the claims in suit or specification of patent relating thereto, covering any such aligning action. The opinion says:

> "In other words, we are of the opinion that alignment is not a function of any of the elements of either of the claims under consideration."

The opinion further says:

> "The function of alignment is therefore dismissed from further consideration."

And the directly hinging together of the waffle members or their casings, in the present case, is equally clearly not a function of any of the elements of either of the claims 6 to 9. And such direct hinging together is not disclosed *at all* in the Wright patent, as to any claim thereof, or otherwise.

The court limited the Layne patent to its clearly disclosed essential mode of operation, involving the stagnant lubricating system, and, finding that defendants followed the prior invention of Jackson as to a circulatory lubricating system, reversed the decree of the lower court with instructions to dismiss the bill.

Our teaching here is also entirely that of the prior art, both as to structure and operation.

Re-organization — None Required Over Prior Art to Produce Appellant's Device—Revolutionary Re-organization Required to Convert the Complicated Three-Membered Structure of the Wright Patent (His Only Possible Invention), Into Appellant's Device.

The situation here is quite analagous to that in *Henry v. City of Los Angeles,* 255 F. 769. There Your Honors found no infringement made out, the mechanical structure of defendant being found totally different from and not equivalent to the electro-magnetic-mechanical and highly complex (and not commercially adopted) construction of the Lyndon patent in suit. As we have pointed out, the complicated articulated structure portrayed in the Wright patent has

never gone into commercial use. Wright has made no commercial use of the invention or of anything contended to contain it. The real appellant, following its prior specific practices in electrically heated apparatus, such as portrayed in the several Lamb patents, in matters of detail structure, and directly employing as a complete frame work and organization, the prior art as exemplified in the British Crompton patent, has taken the field and succeeded. In so doing, it has not utilized the complicated structure or organization, or teaching, of the Wright patent in any respect.

This proposition of "re-organization" applies of course equally to contrasting the patent in suit with the prior art, and to contrasting the defendant's device with the patent in suit—just as, and for the same reason that, the question of anticipation is related to the patent in suit in the same manner as is the question of infringement, it being clearly established in patent law that what would infringe would by the same token anticipate, and vice versa.

Appellee has had considerable to say in his brief about the court being robbed of recourse to imagination for the purpose of producing the *alleged* invention of claims 6 to 9 of the Wright patent as a step over the prior art, it being urged that as the *alleged* invention has been produced and its entity conceived and put before the world, the court can not go through those mental processes attending its creation which the patentee went through in the act of creation. This is a very pretty theory, and it may perhaps fit the facts and cir-

cumstances if the invention here be properly considered to be the complicated thing his specification and drawing really disclose. In either case, however, the rule stands that an alleged inventor is deemed to have before him all other prior devices and patents when he attempts or performs his alleged creative act, whether he has actual knowledge of such prior art or not, as the Supreme Court said in *Duer v. Corbin Cabinet Lock Company,* 149 U. S. 216; 37 L. Ed. 707, quoted from in our opening brief, pp. 31-32. So let us, in the instant case, set the table of the prior art, up to which Wright is presumed at law to have drawn his chair, to partake of the food required to quicken his brain to inventive performance.

On that table must be found the Simplex device, (the electrically heated *waffle iron*), the Griswold device, (the waffle iron with the aluminum baking surface), the Crompton British patent electrically heated culinary device, the Capek patent device, and the prior culinary articles, electrically heated—a whole line of them—put out by the defendant corporation Landers, Frary and Clark, and including in their structure, as does defendant's device at bar, the patented improvements of Lamb, relating to the construction of the heated and heating and insulating features. Now, among all of these devices we may truthfully assert that the Simplex electrically heated waffle iron may properly be regarded as the "generic" structure, within which fall the Crompton device, and

defendant's device—and what appellants *urge* to be the thing patented by claims 6 to 9. When we come down to species, we find that the Crompton patent device (with the aluminum baking surface of the Griswold waffle iron) is the species of the genus adopted for practice by defendant, the same being in detail modified to utilize the unitary construction of baking surface and heating element and insulation invented by Lamb and previously used by the real defendant here.

In so far as the Wright patent applies to waffle iron practice, the species disclosed in that patent lies at the very boundary line of the Simplex device genus, for it is dependent in operation and use upon the inclusion of the base or grill member, (a third element indispensable to the Wright invention), and is a distinct variation from the species that includes Crompton and the defendant. Wright went off on an independent line of development, and devised a complicated *three-membered structure,* falling, perhaps, questionably within the genus of the Simplex electrically heated *two-membered* waffle iron; but defendant indulged in practice true to the main characteristics of the genus, and followed the *two-membered practice,* taking bodily the Crompton organization, and merely modifying it (*not* reorganizing it) *in details,* but not at all in substance. Of course, defendant is presumed equally with Wright to have had the benefit of all prior art devices, in producing and standardizing defendant's structure. And defendant followed closely in practice what was well known in the prior art, and steered away from the

unadopted and commercially ignored three-membered structure of Wright.

It certainly required less "re-organization" on the part of defendant to follow closely as it did the prior art Crompton teaching, than it would require, on the one hand, to make over Crompton or Simplex into the complicated peculiarly operating structure of the Wright patent, or, by the same token, to make over such latter complexity into the opposedly different defendant's device, considering the latter both structurally and as to its operation.

By every test that can be applied to the prior art, defendant followed such prior art in its practice and did not follow the marked variation of species (perhaps within the Simplex genus) evidenced by the complicated Wright patent accomplishment. Defendant is presumed to have drawn up to the same table upon which were displayed the prior art devices, when defendant standardized its waffle iron device. It is clear that it picked out what was old in the art in all detail and in all essential completeness of organization. Wright must have done the same thing, omitting the Lamb features above referred to and selected and used by appellant, if we adopt the interpretation he asks for claims 6 to 9. Upon the interpretation he asks, these claims are void for want of novelty.

But the proof to the contrary, as to Wright's procedure, stands, that his whole teaching is of something not to be found on that table, and which defendant does not use, to wit, a combination of base member,

and two waffle members each separately pivotally mounted upon such base member or grill member, to provide for peculiar evolutions and different uses of one of the waffle members. It required no re-organization over the prior art to produce defendant's device, or to produce the hypothetical device which appellant claims and the lower court found was covered by claims 6 to 9. Therefore these claims must be anticipated or devoid of invention in so far as they relate to defendant's device, (which, of course, we contend they do not.) It would take the highest inventive skill to re-organize the *real* Wright device to product defendant's device. No aid or assistance in that direction is proffered by the drawings and description or any other part of the Wright patent. So defendant should be discharged of the claim of infringement, for its path from the prior art is a direct one and not the circuitous one that leads to and through the Wright patent.

If we refer to the Crompton patent drawing [Tr. 171], we will find in Figure 5, which is a side view of Figure 4, (and *not* a detail of the "lid" of Figure 3), what is the upper portion of a heating appliance, which the specification clearly indicates at Tr. 170, is to be one of two directly heated surfaces, both formed alike. If, we submit, Figure 5 is closely inspected, it will be found that the casing is shown in fragment at the left hand side, projecting below the resistance material and insulation, which is clearly shown in Figure 1 and Figure 2. This indicates clearly that the upper member of the culinary apparatus is to be constructed like

the lower member. It, of course, would be inverted when applied over the lower member and connected with the same by the hinge members such as clearly indicated in Figure 1 and Figure 3.

The "lid" of Figure 3 is a separate hinged attachment and is not the upper member of a device organized as last described, in which the construction of Figure 1 would be duplicated to produce the upper member (of Figure 5), and constitute the patentee's construction where he states:

"In some cases we prefer to use two directly heated surfaces, both of which may be formed as above, * * *"

Clearly, Crompton sets forth four types or combinations, to-wit: One, organized as last described;

Second, using merely the lower electrically heated member and his pressure plate which need not be directly heated but which is organized like the lower member;

Third, using only one heated surface organized like the lower member; and

Fourth, using the lower electrically heated member and an electrically heated lid or cover such as shown in Figure 3.

Surely, Crompton's disclosure is full and suggests many different forms (which the Wright patent does not), and one of which forms, that above first particularly described, is closely followed by defendant, *even down to the flanged baking surfaces, the flanged*

edges extending over the edges of the casing or screen, the screws holding the baking surfaces of the waffle member in the casing or screen, insulation and resistance medium below the baking surface, the legs for the casing, the service wire connections, the direct hinged connection of the two waffle member casings, and everything except the particular application of heating medium and resistance to the baking surface as devised by Lamb and used by defendant in prior devices, and the aluminum baking surface itself, with its well known properties, well known in the art, in the Griswold waffle iron.

In this connection, we here quote from this court's opinion (filed October 3, 1921) *in Majestic Electric Development Co. v. Westinghouse Electric & Mfg. Co., Case No. 3617:*

> "Counsel for complainant claims for the invention a broad construction on the postulate that the patentee was the first discoverer of what he terms the "radiant energy beam" and that the invention is suited to the producing of such a manifestation of radiant energy—
>
> If the patentee was, in reality, the discoverer of this principle, he has made no claim to it, either in the specification or in the claims of his patent. The only elements from which the inference may be drawn that the reflector is in the form of a parabola are that the drawing would seem to be of that type, and the claim that the heating unit is to be at the focus, or substantially so; there is no suggestion respecting its effect in physics, in

> casting a cylindrical shaft of radiant energy from a heat-producing unit so positioned as indicated by the claim"—

(This as to the silence of the Wright patent as to defendant's structure and operation.)

Then the court reviews the prior art, saying:

> "However this may be and whatever may be the concept *as to the function to be secured,* the device, in either sense, is not one that is new in the art"

stating as to one prior art patent, for instance:

> *"While the use sought to be made of the device was not the same as the use to be made of the one in suit"*—

The court relies on an *English patent* as affording a "disclosure of the dominant idea"—Crompton, British patent, is surely a disclosure of the dominant idea of what appellee contends claims 6 to 9 cover. The claim in issue was:

> "An electric heater, comprising a concavo-convex reflector, a heating unit supported at substantially the focus of said reflector, an annular member extending outwardly from the margin of said reflector, and a protective cage having guard wires arched between opposite sides of said annular member." (Italics ours.)

To go somewhat further into detail, which will perhaps be helpful, let us observe that plaintiff-appellee attacks this Crompton patent mainly because he claims that as shown in the drawings its hinges appear too high or too long, that the Crompton specification does

not specify *aluminum as the material* for the heated or cooking surface, that the drawings do not clearly show a *duplicate of the device of Fig. 1* hinged to that device, and that *the patent is an old one.* Counsel failed to point out wherein lay the exercise of inventive faculty in curing any or all of these alleged defects or deficiencies, all of which are most trivial. It is pure hyperbole to consider them as of any serious damaging effect.

(a) *The Crompton Hinges:* The drawings plainly show, but diagrammatically show, the position of the hinges. No description ties the mechanic to the special proportion shown in the drawings. If one is to use the Crompton apparatus for the "culinary" purpose of electrically cooking meat between two electrically heated surfaces hinged together, obviously he would make the hinges to accommodate the meat to be cooked. If he were to make the Crompton device for the "culinary" purpose of cooking "pudding" (specifically mentioned by Crompton and akin to waffle batter), obviously he would proportion the hinges to properly accomplish that result. By no stretch of the imagination could such accommodation of the hinges to one material or another be considered to require more than the skill of the mechanic skilled in the art. Moreover, the Simplex waffle iron, which is itself an electrically heated waffle iron, has properly proportioned hinges for the purpose.

Wright, in his patent, in addition to failing to teach *direct* hinging, makes no specific disclosure as to just

how the hinges shown are to be made to be of the proper proportion. That is left to the mechanic skilled in the art precisely as Crompton leaves it.

(b) Crompton does not state specifically of what *material* his heated or cooking surfaces are made. That leaves it open to a mechanic skilled in the art to take any material adapted for the general purpose of cooking by such a "culinary" apparatus. Before the time that Wright came into the field waffles had been cooked on heated surfaces of both iron and aluminum. Therefore, as the mechanic is not tied down to any particular material by Crompton, the field is open to him, and aluminum being in that then well known field it certainly only required the skill of his art and not inventive genius to use aluminum with its attendant and inherent advantages, whatever they may be.

(c) We submit that no amount of hair-splitting argument could make it require a stroke of inventive genius, in view of the Crompton disclosures, or even without them, to duplicate Fig. 1 for cooking waffles according to the old Simplex method, for instance.

(d) *Age of the Crompton Patent:* This has nothing to do with its effect on the Wright patent. Its teachings are perfectly clear. Crompton's date is 1893, some 23 years before Wright applied. In the case of *Brill v. Washington R. & E. Co.,* 215 U. S. 527; 54 L. Ed. 311, 315, the U. S. Supreme Court had before it a patent for improvements in car trucks, particularly for electric street railway cars. One of the prior art

patents set up in that case to limit or invalidate the Brill patent in suit was a British patent of 1845 to Thyng. Apparently similar criticism was made of this Thyng patent as is made in this case of the Crompton patent as to its age. On this point the Supreme Court says (p. 315—italics ours):

> "It is said that the Brill patent did not follow the Thyng invention *for more than fifty years.* The answer is that for most of that time it was not wanted. Very soon after the change in street railway travel required it, it came." (Italics ours.)

So in the case at bar, Crompton was not wanted until the conditions were right for it, then it came.

The vigorous attack through such trivial objections to Crompton only emphasizes its pertinence to the issues here involved, which must be recognized by all concerned.

The Crompton model used at the argument, as an illustration of the construction shown in the Crompton patent, is helpful. Inspection will show that it carries out precisely the construction disclosed by Crompton in all essential particulars. It shows the box-like casing with its supporting legs and its socket for attachment to the electric circuit. It shows, placed in the box-like casing, insulating material, then the very thin flat resistance wire that does the heating, embedded in insulating material, with insulating material above said wire and the heated or cooking surface resting on the upper edges of the box-like casing *by flanges* extending outwardly from the heated or cooking surface, with

all parts held together by screws, as shown in the drawings of the Crompton patent.

Where courts have failed to rely on foreign patents as defenses it has been where such patents were obscure; not as in the Crompton patent, where they are clear.

Appellee's brief has a great deal to say about Wright inventing a smokeless and greaseless waffle iron surface. He did not. Likewise, appellee has much to say about Wright inventing a waffle iron which can be placed upon the dining table and used on the house circuit. He did not. Nor does he lay any claim to any such structure or invention in his patent, and he cannot patent *mere results*. He only states that aluminum cooking surfaces obviate the necessity of lubrication, which was well known in the art, being true up to a certain temperature. That was utilized in the art in the Griswold iron.

Everything of any organization that Wright now contends he patented in and by claims 6 to 9 is found in Crompton, save and except what Wright *did not invent,* to wit, the use of aluminum baking surfaces—unpatentable material old in the same art—and the specific heating and insulating features, devised and used by defendant, not by Wright.

Appellee's counsel at the hearing and in his brief attempts to magnify the simple mechanical expedient of the flanges on the heated or cooking surface by ascribing subtle and unexpected uses or functions to the flanges. As matter of fact, whether in Wright or

in defendant, the flanges are the purest mechanical expedient. Whatever they do in Wright, they had already done in Crompton. It is an obvious mechanical expedient for finishing the upper edge of the box-like casing of Wright and of Crompton. They cover the casing so that nothing that is being cooked drips down into the box. If made of aluminum, as they could be made without recourse to Wright, they prevent sticking of the batter as they would prevent sticking of the batter if made of iron and greased. The painstaking effort to enlarge the importance of the Wright flanges utterly fails of effect in view of the presence of the flanges in Crompton, with all their resultant and incidental functions.

Attention is here called to a very pertinent decision in Adv. Sheets Fed. R. of Oct. 20, 1921; 274 Fed. 612, Troy Wagon Works Co. v. Ohio Trailer Co., C. C. A. 6th Circ., as to prior art, foreign patents, want of invention and no infringement, and also mere mechanical skill.

With all the prior art before Wright, as we have seen it must be presumed to have been, it involved absolutely no imagination or creative effort to produce the device which appellee *contends* claims 6 to 9 of the Wright patent cover. To produce the intricate and peculiarly operating and never commercially employed three-membered device the Wright patent discloses and was issued for, may, perhaps, have required some sort of inspiration. But this organization has been entirely ignored by defendant, who, and not Wright,

has given the public the modern commercial type of electrically heated waffle iron. Whatever, in commerce, Crompton may have done in England we are not concerned with. In this country the defendant has taken the field, and has certainly not done so with the Wright invention.

In further reference to the opinion of the lower court [Tr. 176], we wish to observe that the reasoning employed, with respect to appellant's contention, that if appellant uses a screen or cover it should devise something else, seems to be entirely out of line with the conclusions reached. If, as appellant contends, it does not use a *box* (although Crompton clearly has it in the prior art) it would not seem that there should be any reason for appellant to devise something else. If he uses a screen or cover and not a box in the sense of the Wright patent, that in and by itself is a further reason to find non-infringement under any interpretation of claims 6 to 9. The court, having limited the Wright patent to the "precise machine described," appellee, under any possible interpretation of the claims, is not entitled to receive indulgence under the doctrine of equivalence.

Specific Reply to Untrue, Erroneous and Misleading Portions of Appellee's Brief.

We beg the indulgence of Your Honors in our replying to and criticising specifically certain portions of appellee's brief, although the preceding portions of this brief and our oral argument have dealt with the general aspects of the same.

On page 9 certain discussion is had of the benefits of using casings of pressed steel. Obviously these casings would radiate heat more readily than thicker porous cast metal casings. But the same kind of casings are found in Crompton.

On page 10 appellee attempts to make it appear that the flanges of the baking surface support the baking member. They may do so in defendant's device, but they do not do so alone, at least, in the Wright patent device.

Referring to page 24, appellee indulges in a discussion of what claims 6 to 9 mean in the use of the language "pivotally connected together," referring to the casings. As we have seen, this can only mean that the casings are pivotally connected together *through a grill or base or foundation member,* for otherwise the device of the Wright patent would be clearly inoperative, and this base or grill member is one of the "principal parts" of the Wright invention. Indeed, within the language of the Wright patent, and its drawings, if either the base or grill member or the lower waffle member or the upper waffle member be omitted, *the entity of the patent is destroyed.* Particularly, should the base or grill member a be omitted, or the grill member c be directly pivotally connected to the grill member b, the device would be absolutely unusable. That being the case, there is no possible proper interpretation of claims 6 to 9 other than one which includes the base or grill member a or its frame, as the means for pivotally connecting together the

waffle members b and c. Appellee states that the phrasing of claims 6 to 9 includes both the pivoting together through a grill member or pivoting directly together. But, inasmuch as the device cannot operate in the latter case, appellee's assertion and argument are false on the very mechanics of the case.

Apart from Crompton, which meets each and every feature of claims 6 to 9, in so far as, under any interpretation, they could apply to defendant's device, with the exception of the use of the old Griswold aluminum baking surfaces, the statements of appellee as to what Wright did are entirely erroneous when consideration is given even to the Simplex electrically heated waffle iron which has a pair of hingedly connected casings with waffle baking members mounted therein, in lieu of the old circular stand and revolvable pan type of waffle iron, (p. 8 appellee's brief). Within these "casings" of Simplex are resistance and insulation.

Opposing counsel seemed to desire to lessen the effect of this Simplex iron on the ground that it was not specially explained at the opening argument. It is fully set out in appellant's opening brief. Its construction and mode of operation are so obvious on inspection of the device itself (Defendant's Exhibit No. 1) that the Simplex device divests Wright of all broad novelties for its specifically and electrically heated waffle iron. Its size and make-up are of no moment. Size is no feature of the Wright patent and nothing disclosed therein makes his patented device especially

adapted for table use any more than the Simplex device, as will be seen by a comparison of Simplex with either of Wright's early models. While it is true that Wright describes aluminum as usable in his device, Simplex, in view of the prior Griswold waffle iron, could substitute aluminum for iron if desired without appeal to Wright, and the Simplex stand could be reduced in size accordingly without appeal to Wright. Wright's device showing his patented construction was not of a size adaptable to actual dining table uses in the sense that defendant's device is. There is nothing in the claim that Simplex takes more heat than is available on a lamp socket line. The amount of heat required is dependent upon the amount of resistance wire that is put into any of the devices plus current wattage. That special amount is not disclosed nor claimed by Wright. That is left to the choice and judgment of the mechanic skilled in the art. The Simplex iron also shows hinges adopted for waffle cooking, if that is of any importance.

In view of Simplex, Wright was not the first to tell the art that waffles, specifically, could be cooked by electricity. Simplex had already accomplished that and had done it by hinged electric cookers inclosed in casings and with hinges of a size or length so that the irons would fold flat on each other and keep the batter in. Wright simply *professed* to disclose a new structure or way of making a waffle iron in combination with a grill member.

On this page 24 and the previous page appellee finds considerable fault with the Crompton device as having

too long hinged members. We are not advised that the alleged invention of Wright produced any superiority or reflected any ingenuity as regarding the length of hinge members. The functions and uses and results of a thing, new or old, cannot be patented. It is pure nonsense for appellee to discuss the advantages of particular current wattage, appearance and convenience, as fitting a waffle iron for table use. We do not believe the device of the Wright patent, as exhibited, would be chosen by any housewife to put upon a dining table. As to the impropriety of laying claim to function, result, principle and the like, the courts have repeatedly disapproved such contentions on the part of patentees, as in the decision of the Supreme Court, *O'Reily v. Morse,* 15 How. 62, 112, 14 L. Ed. 601, 623. (And to the same effect see *Morton v. New York Eye Infirmary,* 5 Blatchf. 116, Fed. Cas. No. 9865.) In the Morse case, the attempt of Samuel F. B. Morse, the inventor of the telegraph, to cover the "principle" of using as motive power the electric or galvanic current *with the result* of marking or printing intelligible characters at a distance, was condemned, and the claim of his patent purporting so to do was found void.

Plaintiff's counsel, looking at defendant's device, emphatically attributed to Wright the first disclosure of an electrically heated waffle-iron device to be operated on a table, that is, we presume he meant on an ordinary dining table at which a meal is being served. Counsel failed to point out so far as we can judge what

there is about the structure recited in the Wright claims in issue that insures it as a success for table cooking as compared with Crompton or other prior art structures. Certainly the device that Wright puts in evidence as an embodiment of his invention is a poor make-shift for a table cooker. His patent gives no clue as to the proportions or sizes that make it best of all for such table use. Certainly there is nothing in his claimed elements of mechanical structure of box-like casing, with the materials in the order named placed in them and the flanged cooking surface on top, that is not fully disclosed in Crompton, to say nothing of other prior art. If it is the employment of aluminum that solves the riddle, Wright, as we have seen, is not entitled to be accorded a monopoly in electrically heated waffle irons because of his having mentioned aluminum as the material for the heated or cooking surface. That was old in the art before him. Certainly no disclosure is made in Wright as to the amount of current that is to be used. Of course if Wright is going to cook many waffles at once, as one of his exhibits shows he intended to do, he must use more current than if he only cooks two waffles at once. But his patent does not reveal any disclosure of structure or combination of elements that restricts him to a pair of waffles to be cooked at one time. It does not reveal any detail that is to be relied on, or is essential to adopt, in order to affect the amount of current required. No single feature, nor all the features of Wright in combination, results or result in mere ornamental table waffle cook-

ing. It is true defendant's device might be so used, but that results not from any novel disclosure by Wright, or any teaching in his patent that any novelties of structure disclosed by him are necessary for making the table cooker, or that any departure from them would result in failure. There is absolutely no merit in the "for table use" argument of plaintiff.

In *Carver v. Hyde,* 16 Pet. 513, the Supreme Court said that the end to be accomplished is not the subject of the patent. The invention consists of the new and useful means of obtaining the end.

In *Corning v. Burden,* 15 How. 252, the Supreme Court said that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produced it.

Wright devised no new construction which has been appropriated by defendant. If his three-membered device (which we doubt) is economical in consumption of electrical energy, and is pleasing in appearance and use on a dining table, it never has met with public adoption, which would seem to speak louder for its demerits than appellee can speak by brief or argument for any merits it possibly may have. It stands today idly by the wayside. The practical part has not paid it any recognition.

On page 32 appear some outright misstatements in dealing with the Crompton device. The Crompton device obviously *does disclose* fairly a pair of casings piv-terning of the surface being immaterial) and *does show*

waffle members mounted in the casings (the mere patenting of the surface being immaterial) and *does show* such waffle members with flanges covering the upper edges of the casings, whether they be of aluminum or any other metal. With Griswold's teaching, this use of aluminum by defendant was optional and Wright was not the first one to teach it.

On page 33 appellee makes it appear that we have suggested that certain other patents and devices "might, by a process of modification, re-organization, or combination with each other, be made to accomplish the function performed by the device of the patent sued on," but we have made no such suggestion, although appellee purports to quote our language. We have stated to the exact contrary, that *no modification, re-organization or combination is required to apply the Crompton device to our purposes, but that complete modification, re-organization or combination* of the parts and features of the Wright patent disclosure would of necessity be required to build up defendant's device.

Lower on this page 33, appellee creates an entirely erroneous impression and one totally unwarranted by the record, as see petition to reopen case and notice thereof, [Tr. 162] and affidavit of Raymond Ives Blakeslee [Tr. 164]. Defendant's counsel never knew of this Crompton patent until during the trial of the case. Appellee would make it appear that we did know of it before and did not discover any resemblance between the Crompton patent and the Wright invention

until after the trial, and then resorted to it in desperation. But the record makes clear what really occurred. It is true that there is no resemblance between the Wright patent disclosure and the Crompton patent as to general organization; the resemblance is between Crompton and what appellee contends for claims 6 to 9, in so far as it could apply to appellant.

At the bottom of page 33 is an argument for the repatenting of old things. Anything that was in Crompton certainly could not be again patented by Wright.

On page 41 appellee observes that the Simplex iron will not perform the functions of the Wright iron and is more expensive in manufacture. It certainly will electrically cook waffles and we doubt whether it is as expensive to manufacture as the complicated many-pivoted, link-connected, subject of the Wright patent.

On page 42 appellee makes some very sweeping statements which are not borne out by the facts, inasmuch as even the Simplex device has the box-like formation, the folding casings being hinged together in pairs. What the flanges have to do with the folding over of one casing on the other we cannot understand. This was old in Crompton.

On page 43 appellee opines that it is much easier to add than to invent. If Wright invented anything it certainly did not *add* anything to the useful arts, as far as public adoption is concerned. If any adding has been done by defendant, it has been entirely outside of the calculations of Wright.

If, as appellee states on page 48, the Wright invention comprises a new combination of elements and serves a new function, not met by any prior patent or device, we must conclude that this is predicated upon the exact three-membered device which is the only thing disclosed in the patent.

For the purpose of this case, Wright may be allowed the monopoly of his claims 1 to 5. To concede to him what he asserts for claims 6 to 9 would be to wipe out of the prior art and the record thereof in this case what defendant employs and what Wright did not contribute to the art. Within the authority cited on page 49, we can, in the case at bar, leave appellee the "jewel" (if it ever receives public valuation) depicted in his drawing and described in his specification. From the public viewpoint the "jewel" of value is that thing not invented by Wright, but which defendant put on the market.

A direct distortion of testimony appears on page 50. Being convinced that it cannot accurately be said that an aluminum waffle baking member is mounted *in* each of the casings or any casing of defendant, appellee attempts to convert the testimony to an admission in that behalf. He says that the admission is that the member is "mounted in." The testimony, as appears immediately after in answer to X Question 131, says "mounted on."

A little further down the page, appellee says quite accurately that an electric heated element is "annexed" to the under side of each of the waffle-baking members

in defendant's device. But in the Wright patent the heating element is not *annexed* to the waffle member at all, but is between the waffle member or the aluminum baking surface and the bottom of the casing. No indication is given in the Wright patent as to the means employed to hold the waffle member in the casing and over the insulation and heating element which is apparently closely confined beneath it, and upon which it rests.

At the bottom of page 50 is a clear departure from mechanical fact and distortion of relations. Defendant's heating element is certainly not *between* the waffle member and the casing in the sense of the Wright patent, but is *on* the waffle member and definitely spaced from the bottom of the casing. In the Wright patent, the heating element is closely confined in insulation between the bottom of the casing and the waffle member.

On page 51 appellee gives a peculiar and, it would seem, obsolete definition of the word "mounted." A better definition would seem to be that of Webster's International Dictionary, to wit, "placed on a suitable support or fixed in a setting. * * *" Each of these parts of the definition signifies a *superimposed* relation. A stone "fixed in a setting" is "mounted" on the ring. It would be a strained and peculiar use of the term to imply in its use that the mounted thing was *in* an enclosing structure, and such meaning could not naturally follow unless a clear limitation to such en-

closed relation were defined. Wright does this in the patent by providing specifically that the waffle member is *in* the casing. Of course in the Wright device the waffle member is mounted *on* the insulating and heating element which are *on* the bottom of the casing. This sort of mounting is not found in defendant's device at all. In Wright's patent the aluminum baking surface is mounted *in* the casing, and is mounted on the insulation and electric element which are in turn mounted on the bottom of the casing. This accounts for the distinction in these matters, which the trial court found, where the opinion observes that defendant's electrical attachment "is fastened to the waffle-irons by screws instead of being contained in a box, * * *" This is the particular difference in which defendant, following otherwise the teaching of Crompton, *reorganized* the heating element and its insulation and the *mounting* of the baking surface, or waffle member, and in doing so did not follow Wright. Remembering that appellee is barred from resorting to the benevolence of the doctrine of equivalence and is limited to the "precise machine described," claims 6 to 9, even with the most favorably improper interpretation, cannot be infringed.

Defendant uses in these respects simply what it had used in the same general art before.

Counsel is in error in apparently attempting to have it understood that defendant's device is primarily made up of a pair of casings hinged together. In Wright

the casings are of essence, because, as in Crompton, they receive and contain in themselves all the other parts of the waffle iron. In defendant's structure, as the court will see, the waffle iron itself has mounted on it (is equipped with, if you please) the insulating material and the heating wire. This is different from Crompton; this is different from Wright. That is like the Lamb, L. F. & C. stove. That is a different mechanical conception of how to organize an electrically heated waffle iron, or any electrically heated cooking surface. Crompton and Wright both had the idea of using box-like casings in which all the other parts were assembled and piled up from the bottom. Defendant, departing from both Wright and Crompton, attaches its insulating and heating parts directly to the bottom of the waffle iron itself. What are called the "casings" in defendant's device are only so in name. They are not so in the function of casings of the Wright patent or of Crompton. If, therefore, Wright is to be considered, as he must be, as disclosing *casings* that contain, he is fully met by Crompton. If, to try to avoid Crompton, he resorts to trivial and non-essential differences, he restricts himself immediately to features not present in defendant's device. Defendant in making its waffle iron simply followed its own prior practice in making the Lamb electric stove. That is, took a flanged heated or cooking surface to the bottom of which it attached the insulating material and resistance wire, and then placed a sheet metal cover or screen about them to cover their unsightliness and to

protect the leading-in wires. In the case of the Lamb stove the casing happened to be round in shape instead of rectangular as in Wright, but Wright in his patent states specifically that his device may be of any shape, so shape is not material.

On page 52 appear some very distorted reflections of defendant's device. Clearly, in defendant's device, there is *no* non-conducting or insulating element spacing the electric heating element from the casing, nor is the metal plate confining the heating element and insulation primarily supported by the casing; nor do the mica pads of defendant's device, together with the plate, insulate and separate the electric heating element from the casing; nor do these features find their counterpart in the Wright patent disclosure in performance or function; nor are the said elements of defendant's device supported "in the casing by the casing," in the sense that the Wright baking surface and heating and insulating elements are "mounted" *in* the casing; nor do similar results—that is, as to function—produce equivalence; nor can defendant's device operate the same as the Wright patented device operates. The matter on the following page is not established in mechanics. The thin steel casings would radiate and waste more heat than thicker casings, increasing dissipation. Other features of advantage set forth, whether correctly or incorrectly stated, were not Wright's contribution to the art. Wright's conception was not generic but very specific, and defendant does not follow it. That would be true even if

Wright had patented a two-membered waffle iron. We have discussed the opinion of the court and pointed out the apparent error of reasoning therein based upon the court's own narrow interpretation of the claims in suit. Even giving them the interpretation asked by appellee, they should be limited to the exact thing of the drawings and specification. The part of the opinion quoted from on page 54, in all substance, as truly, and more truly, applies to a comparison between claims 6 to 9 of Wright as construed by the lower court, and the Crompton device. Again, what would infringe if later, must anticipate if earlier.

If the court will consult the citation on page 54, from 263 Fed. 577, 580, the following language, which gives a much truer complexion to the quoted matter, will be found on the same page:

> "A patentee may describe something that he does not claim or claim that which he has not described. His grant of privilege is construed to cover only that which is both described and claimed, no matter how broad the claim language may be. Loraine, etc., Co. v. Gen. etc., Co., 202 Fed. 216, 120 C. C. A. 615, Lovell v. Seybold, etc., Co., 169 Fed. 288, 94 C. C. A. 578. Description may limit a claim, which must always be read in the light of the prior art. (A phrase amplified in Pelton v. American etc. Co., 239 Fed. 321, 152 C. C. A. 308); but it can never expand it. (Fowler v. McCrum, etc., Co., 215 Fed. 909, 132 C. C. A. 143.) So that a patent (ie. a claim) can never be given a construction broader than its terms in

order to cover something which might have been claimed but was not. Universal, etc., Co. v. Sonn, 154 Fed. 665, 83 C. C. A. 422.

"The drawings may help out an ambiguous description, but never can they supply the entire absence of any written description of a feature of the invention (Windle v. Parks, 134 Fed. 381, 67 C. C. A. 363);"

In this last cited case, which inspection shows to be entirely contrary to the trend which appellee would give it in the fragmentary quotation, the decree of the lower court finding infringement was reversed. And it is obvious that that case makes it clear that one cannot lawfully claim by patent what is not clearly described. And Wright makes no description of any device devoid of his three "principal parts." Obviously, claims 6 to 9 must have read into them the construction and law of operation of the patent, which involves the use of the base or grill member a, or foundation member, as the means through which the pair of casings are pivotally connected together.

That the claim must be construed wholly within the light of the description is further laid down in *Homar Brooke Glass Co., et al. v. Hartford Fairmont Co.* (*C. C. A. Second Circuit*) 262 F. R. 427, 430, a case in which a decree for defendant was affirmed, as follows:

"Whether Mr. Brooke's invention is of such a primary nature as to merit the application of the word 'pioneer' we shall assume, but not decide;

for whatever the proper adjective applicable to this patent, the legal rule of construction is the same. Outlook etc. Co. v. General etc. Co., 239 Fed. 878, 153 C. C. A. 5, *et seq.* It is always necessary, even after granting the widest range of equivalents, to find as a matter of fact that what the defendant has done is the invention of the plaintiff 'substantially as described.' The range of decision, the limits imposed by law on the triers of the facts, are indicated by the word 'substantially'; an infringer may easily substantially inmitate a big thing—i. e., a deeply rooted and wide-spreading inventive thought; whereas, without 'Chinese copying,' imitation of a little thing is oftentimes difficult.

"But, whether the invention is large or small, primary or trivial, it remains true that, when a claim is clear and distinct, the patentee cannot go beyond the words thereof for the purpose of establishing infringement; the specification may be referred to for the purpose of limiting, but not of expanding, a claim, and the range of equivalents is measured by what is described *and* claimed. Westinghouse, etc., Co. v. New York, etc. Co., 119 Fed. 874, 56 C. C. A. 404; Universal, etc., Co. v. Sonn, 154 Fed. 665; 83 C. C. A. 422; Loraine, etc., Co. v. General, etc., Co., 202 Fed. 215, 120 C. C. A. 615; Fowler, etc., Co. v. McCrum, etc., Co., 215 Fed. 905, 132 C. C. A. 143."

(Italics appear in text.)

On page 55 there is a clear misstatement as to claim 6, reading upon the specific embodiment of the Wright

invention illustrated in the drawings. It does not without the grill member. That is obvious.

On page 57 discussion occurs as to what is meant by the flange extending past the edges of the casings. As the patent shows them extending beyond the outer edges, that is clearly what must be meant. Unless the flange goes beyond the *outer* edge, batter would adhere to the edge, which appellee says, *supra,* it must not.

On page 58, the absurd statement is made that defendant's device has insulation insulating the heating element from the casing. Any such insulation is done entirely by air space—not by insulation resting on the bottom of the casing as in Wright.

It is not necessary to differentiate further between the Wright specification structure and the totally different organization of defendant with its different performance and law of operation.

On pages 60, 61, appears a quotation from *Continental Paper Bag Company v. Eastern Paper Bag Company,* 210 U. S. 405. Appellee very deftly terminated the quotation before a very significant sentence, which immediately follows, to-wit:—

> "They may be explained and illustrated by the description. They cannot be enlarged by it."

This clearly supports, with the authorities *supra* and in our opening brief, our contention that the claims cannot, in interpretation, go beyond the clear teaching of the description in the patent. It is *enlarging* the claims of the Wright patent to interpret them to cover

something abhorrent in operation to and totally different in structure from the "best" form of the invention explained and set forth in the description.

Robinson on Patents, Vol. II, Sec. 485, quoted with approval by the Supreme Court in this last cited case, further states in this connection:

> "But one mode of reducing the idea to practical utility must be described, and this must be the best one known to the inventor, since to withhold, for his own use or that of the licensees, a better form than that which he bestows upon the public would be a fraud upon them and render the patent void."

To ask the court to find something not disclosed in the patent, to be the principal and generic thing of the patent, is certainly doing violence to all rules of interpretation.

The authority cited by appellee on pages 62, 63 (171 Fed. 656, 663) clearly supports our contention that the base or grill member of the Wright patent may be read into the claims as part of the organization for pivotally connecting together the casings, for each of claims 6 to 9 "includes an element in general terms, and refers to the specification to identify it." And so "We may read that element into the claim—a rule of construction applicable to all written instruments; * * *" The term "pivotally connected together" means and can only mean *pivotally connected together by means of the base or grill member or the frame thereof.*

In the same volume of Robinson, section 515, the following significant language is found:

> "Finally, as the claim is the request of the inventor for the protection of the invention communicated to the public in the Description, it must entirely correspond with the Description and be based upon the matter therein contained. No invention can be claimed in any specification unless it has been previously described in such a manner that any person skilled in the art could practice it from such Description, without experiment or the exercise of his own inventive skill. Features of the invention not delineated in the Description cannot be inserted in the Claim, even though a mechanic in endeavoring to construct or employ the invention would inevitably discover them. Matter described as auxiliary, but not essential to the invention, cannot be stated in the claim."

Clearly, experiment and invention would be required to produce appellee's structure and operation, with the different teaching of the Wright patent as a guide.

It appears from the record that all of appellant's procedure was justifiable, was made without knowledge of the Wright patent, followed in its structural details the prior practice of appellant (and Crompton and the aluminum baking surface of Griswold); and inasmuch as appellee's device never went on the market, but appellant took the field with the alleged infringing device, no case of piracy or any equitable ground for finding piracy in this case appears.

As to the rule of law limiting the patent in suit to the exact thing described and pictured, we repose

full confidence in this case in the position as often taken by this Honorable Court, as in *Henry v. Los Angeles,* 255 Fed. and *Schultheiss Co. v. Phillips, et al.,* 264 Fed., cited in our opening brief. The treatment of this subject on pages 69, 70, tends to cloud the issue in the case at bar, for under the authorities cited *supra,* as well as in our opening brief, all of the claims of the patent must be limited to the exact thing which the patentee has said is his invention. To the same effect is the decision of this court in *Wilson and Willard Mfg. Co. v. Union Tool Company,* 249 Fed., cited in our opening brief.

The excuses reflected at page 72, and directed at explaining why appellee did not put his alleged invention on the market, are unavailing. His complicated patent structure remains in oblivion, while appellant has given a different structure to the market—a structure which has been adopted and *which did not follow the path of Wright's mechanical procedure.* This last speaks volumes for appellant's contention of non-infringement. There was evidently nothing of commercial merit in the Wright patent structure. Surely, if appellant could manufacture in New England and ship its product across the continent and extensively market it on the Pacific coast, appellee, domiciled here, should be able to make a reasonable commercial showing here *—had his invention had commercial merit.* We venture to say that appellee has throughout this litigation been striving for an interpretation of claims 6 to 9 which, prior to the advent of appellant's production, he never seriously conceived such claims were entitled to,

and, judging his patent upon its face, we are inclined to reflect that the interpretation he is asking for as to these claims was built up in appellee's mind, and urged upon the lower court, to satisfy the exigencies of the situation after appellant's device appeared.

A reasonable deduction from the comparative conducts of appellant and appellee is that the appellee's patent is for a commercially unacceptable complicated thing, and that appellant gave to the market a really acceptable device, although from the standpoint of creation its whole organization had been previously worked out—*not* by Wright.

Henry v. Los Angeles, 255 Fed. *supra,* answers, as the utterance of this court, the authority on page 73 as to non-use, commercially, of the thing of the Wright patent, and non-use by appellee, commercially, of anything he now contends to be within the metes and bounds of that patent.

Crompton plus the Griswold aluminum waffle iron baking surface gave the accepted commercial device to the world, further plus the details which defendant's inventor, Lamb, produced. *All these things were prior to Wright.*

Appellant does not use any structure having the complex interrelation or law of operation or teaching of the Wright patent. If claims 6 to 9 are to be sustained—if they have any detail novelty whatsoever—the base or foundation or grill member a, one of the "principal parts" of the Wright invention as disclosed

and pictured in appellee's patent, must be read into said claims, as an essential part of the organization whereby the casings are "pivotally connected together." This is the *real* "precise machine described" and the trial court says the claims should be limited to the precise machine described. If they are not so limited, they recite inoperative construction. Defendant has not employed this "precise machine described" or anything having the clear and only teaching of the Wright patent, either in general combination or detail. It has ignored the teaching and the only teaching of the Wright patent.

Infringement cannot be predicated on any such condition of facts and the law pertinent thereto.

If the claims are construed so as to include defendant's device, they are clearly invalid and void for want of invention or novelty over Crompton and the other prior art; or, if sustained at all, they are not infringed by defendant's structure, because of the limitations of the prior art and of the patent itself and the file wrapper and contents thereof—and because they are for a different structure having an irreconcilably different mode of operation.

We again respectfully submit that the decree of the District Court should be reversed and the bill of complaint dismissed with costs to appellant.

Respectfully submitted,

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JOHN P. BARTLETT,

Of Counsel for Defendant-Appellant.

No. 3715

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pacific States Electric Company,
Appellant,

vs.

William D. Wright,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

FREDERICK S. LYON,
LEONARD S. LYON,
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SUPPLEMENTAL BRIEF FOR APPELLEE.

We desire to briefly reply to certain contentions made in the reply brief for appellant and have obtained the permission of this Court to that effect. It is felt that there has been an attempt in appellant's reply brief to bemuddle the facts of this cause and confuse by reference to unsound and erroneous propositions of law.

Aaron Burr is reputed to have defined "law" as "whatever is boldly asserted and plausibly maintained." However incorrect this definition may be, it fits the instant case if appellant's position be deemed to even bear color of law.

We regret the undignified and unjustified manner employed by opposing counsel in referring to "Untrue, Erroneous and Misleading Portions of Appellee's Brief." Apparently counsel do not agree with the propositions advanced in appellee's brief, but nothing appears warranting descending to discourtesy. We have carefully reviewed each of the items referred to under the aforesaid heading and find no item that we do not consider correct and do not reaffirm. It has been said that to a great extent men live and die by and for catch words, and when argument fails resort may be had to charges. Calling your enemy names is one of the most common ways to do him injury. With such devices, useful as they may be to anyone seeking to influence the actions of people through their emotions, courts should have nothing to do. It is most necessary that those who seek to do equity between man and man should weigh facts uninfluenced by words hurled to prejudice. We can see no reason why this case cannot be determined on its facts.

This case appears to us to be very simple. There are only two questions before the court. We present claims 6-9 of the Wright patent in suit. Do these claims define a combination of parts that was non-existent prior to the Wright invention? Has defendant employed the combination *defined in claims 6-9?* The District Court answered both questions affirmatively. Appellant has presented page after page of involved and confusing argument, but appellant cannot show a device in the prior art containing the combination of

the claims in suit, nor a device that will perform the function thereof. A comparison of the claims with the infringing device establishes the finding of the trial court that the infringing device is "in every way the same as that claimed by the plaintiff in his last four claims." (R. p. 176).

Appellant contends that claims 6-9 in suit are not generic claims because in the drawings and specifications of his patent Wright described only one specific embodiment of his invention. The position of appellant is contrary to the well settled law. See Walker on Patents (5th Ed.), p. 134:

> "It is a proper practice to make a generic claim and also a specific claim, in an application for a patent on a generic invention, even where only one species is described in the specification."

Citing:

> Hill v. Hodge, 12 App. D. C. 530;
>
> J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259;
>
> Ryder v. Townsend, 188 Fed. 792;
>
> Zittlosen Mfg. Co. v. Boss, 219 Fed. 887.

> "He who invents one species before any other person invents either the genus itself or any of its species is entitled to a generic claim. It was not necessary for Ewart to refer, as he did in his original application, to the form of double socket shown above in Figure 2 in order to entitle him to a generic claim; for, while a reference to several species by way of illustration is admissible, *a de-*

scription of one species is as perfect a basis for a generic claim as a description of several."

Ex Parte Ewart, 17 O. G., 1189.

The foregoing rule is founded on R. S., Sec. 4888 providing that an inventor need only describe one embodiment of his invention in his patent. Having described one embodiment he has also thereby described the genus represented specifically by that embodiment. This follows from the fact that a species is necessarily a particular embodiment of its genus. We, therefore, find the rule that a description of a single specific embodiment is a proper basis for claims to the genus, as well as claims to the species.

> "A genus claim states in broad terms the essential characteristics common to all of a family or group, while a species claim is one of the many illustrations of the genus, and defines the peculiar characteristics that distinguish it from others of its kind."
>
> Rogers on Patents, Vol. 1, p. 58.

This apt definition finds perfect application in distinguishing between specific claims 1-5 and generic claims 6-9 of the Wright patent. The latter claims state "in broad terms the essential characteristics common" to the two specific embodiments of the Wright invention. One of these specific embodiments is found in the waffle iron *per se* as illustrated in plaintiff's Exhibit 3. The other specific embodiment constitutes plaintiff's exhibit 5 illustrated in the drawings of the patent in suit.

A comparison of claims 6-9 with both of these specific devices demonstrate that the claims read upon and recite the common elements and features found in both forms. For example claim 6 contains the following elements:

1. A pair of casings (pivotally connected together).
2. A waffle member (mounted in each casing).
3. An aluminum baking surface (for each waffle member).
4. A flange on each baking surface (covering the upper edge of its casing).
5. Means to electrically heat the waffle members.

There is positively no limitation in this claim warranting restricting it to "pivoting the casings together through a grill member" as appellant urges. Wright purposely specified broadly and generically that the casings should be "pivotally connected together." This certainly includes "directly" or "indirectly" because in either case the casings are pivotally connected together. All reference to the grill member was excluded. We submit that the claim is definite and clear and is not limited to the grill member.

As generic claims 6-9 are clear and unequivocal in terms they should be construed as written.

> "The court is not concerned with the motives which induced the patent officials to require or the patentee to accept the claim. It is enough that it is in the patent and that it is couched in language so plain and unambiguous as to leave no room for

construction. The courts must deal with claims not as they might have been but as they are."

Ryan v. Metropolitan, 144 Fed. 697; 75 C. C. A. 513.

Appellant further urges that the law of operation of the Wright invention as embodied in the specific composite iron and grill device is "repugnant" and "abhorrent" to that of the same invention as expressed in the waffle iron *per se*. This appears to us to be an attempt to cover by language that which is lacking in fact. In baking waffles the two specific devices function identically. The upper casing is first turned back and the waffle batter spread on the lower baking member. The upper casing is then folded down upon the lower casing. The heat is applied to the waffle baking members through identical electrical elements. The aluminum baking surfaces conduct the heat efficiently and directly to the batter. The flanges on the baking surfaces prevent the batter from adhering to the casings or from running down inside the casings. After the waffles are baked the upper casing is turned back and the pastry is removed. This is the way both specific forms of the Wright invention operate in baking waffles.

The waffles are baked in identically the same way and the devices function identically with both forms. The grill member does not enter into the waffle baking operation in the specific device illustrated in the patent drawings. Baking waffles and grilling meats are

independent and separate functions. The grill feature is excluded from claims 6-9 and is the subject of claims 1-5.

Appellant has adopted the specific form of the waffle iron *per se* and utilizes all of the benefits of that form. It is not necessary that appellant also employ the independent feature of the grill in order that infringement exist. As said by this court in its opinion rendered October 17, 1921, in Western Well Works v. Layne & Bowler:

> "It is not necessary, in order to maintain a suit upon such a patent, says the court, 'that there should be a violation of the patent throughout. It is sufficient if any one of the invented machines or improvements is wrongfully used; for that, *pro tanto,* violates the patent.'
>
> "To the same effect is Emerson v. Hogg, 2 Blatch. 1, 8; 8 Fed. Cas. 4,440, p. 613. Hogg v. Emerson, 6 How. 437; Hogg v. Emerson, 11 How. 587.
>
> "This rule applies to the invention described in a separate claim as well as to the invention described in the patent as a whole."

Necessarily there are specific differences between the two specific embodiments of the Wright invention. There necessarily must be such difference or there could not be more than one specific form. Claims 6-9 are not limited to any specific differences. To the contrary, claims 6-9 define generically only the features common to both forms. Claims 1-5 take care of the specific differences. The contention of appellant is

based on totally ignoring generic claims 6-9 and treating the patent as limited to the one form shown in the drawings. This position is contrary to law and is unjustified in view of generic claims 6-9 and in view of the fact that *Wright in fact produced both forms embodying his generic invention.*

Obviously to construe claims 6-9 to cover generically both specific embodiments of the Wright invention is not interpreting those claims to cover an inoperative device. Both specific forms admittedly perform their functions properly.

Appellant refers to the fact that the record contains no reply to the letter of December 9, 1915. This is a letter sent to an attorney in Washington, D. C. enclosing a sketch of the Wright waffle iron, plaintiff's exhibit 3, for the purpose of having a search made as to its patentability. (R. 215-217). The letter was offered in evidence while Mr. Wright was on the witness stand (R. 76). It was offered to prove that in fact Wright was the inventor of the specific form of his invention illustrated in plaintiff's exhibit 3 and that this device was completed prior to the filing of the application for the patent in suit. This testimony was not contradicted and there was no occasion or request that any reply to the letter should be produced. Counsel for appellant cross-examined Mr. Wright but did not ask for a reply to the search letter if there was a reply. Under these circumstances we submit that the unsupported romancing of counsel as to the possible contents of the pos-

sible reply is unjustified. It is customary to decide cases on proofs and not speculation.

Appellant urges that the court should limit the claims in suit to the specific form illustrated in the Wright patent drawings because of the statement appearing in the specification of the patent concerning the principal parts of the invention. It is elementary that the scope of a patent is set by the claims and that the specification is to be resorted to when necessary to determine what is referred to by the claims. Where the claims are clear they are to be interpreted as they stand. It is not the office of the specification to define the metes and bounds of the patent. Furthermore, the aforesaid statement in the Wright patent appears as part of the description of the specific form illustrated in the drawings. Undoubtedly, the statement refers to the principal parts of that specific form and has proper office as regards claims 1-5 of the Wright patent. As the inventor expressly excluded the grill member from claims 6-9, the statement must be restricted in application to specific claims 1-5. As the office of the claims is to set the metes and bounds of the monopoly and as claims 6-9 exclude the grill, the clear wording of those claims should not be overthrown by a statement in the specification intended to pertain to the species of claims 1-5. If there is any doubt it should be resolved in favor of the inventor. As to a similar statement see the decision of this court in Pederson v. Dundon, 220 Fed. 309.

Appellant represents that the specification of the Wright patent contains no statement indicating that it was not the intent of Wright to limit his patent to the specific form described. We believe this to be immaterial in view of the definite and clear character of claims 6-9. But in any event the representation is not founded in fact. At the close of his patent specification Wright stated that although he had described a certain particular form, he did not desire to be limited thereto in view of the "scope of my invention in its broadest aspect."

> "Although I have described my improvements with considerable detail and with respect to certain particular forms of my invention, I do not desire to be limited to such details since many changes and modifications may well be made without departing from the spirit and scope of my invention in its broadest aspect." (R. 213.)

Coupled with generic claim 6-9 definitely excluding the grill member we can see no room for doubt on this point. Compare the decision of this court in Kings County Raisin & Fruit Co. v. U. S. Consol. S. R. Co., 182 Fed. 59 at p. 64:

> "Not only is there nothing in the specifications or claims to indicate that Pettit intended to limit his claims to the precise form described, but the contrary is indicated by the terms of claim 18, and by the language of the specifications, in which it is said that:
>
> " 'Various modifications may be made in the construction shown in the drawings and above

particularly described, within the purview of my invention.' "

The entire position of appellant as to the character and scope of claims 6-9 in suit is not supported by law and is totally wanting in equity. Appellant refuses to recognize the unequivocal terms and meaning of claims 6-9 and endeavors to have the court treat the drawings and specifications of the Wright patent as the metes and bounds thereof. This contention violates the very nature of the patent grant. By statute the inventor describes and illustrates one specific form embodying his invention. He then gives notice of the scope of his patent by his claims. If appellant be correct *claims are useless* and no patent can cover anything except the one specific form illustrated in the drawings. That has never been sound law.

Wright was in fact the inventor of both specific forms in which his generic invention may be embodied. He had completed, tested and used, devices of both specific forms before filing his application for the patent in suit. In compliance with the statute and law he described one specific form in his drawings and specification and made claims 6-9 to cover both forms. Under the circumstances we submit that the court will protect that which Wright actually invented.

"The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to

> the letter of the statute, or by the application of artificial rules of interpretation."
>
> Topliff v. Topliff, 145 U. S. 245.

We believe that the interpretation given by the District Court to claims 6-9 in suit is fully supported by the decisions of this court in Von Schmidt v. Bowers, and Los Angeles Art Organ Co. v. Aeolian Co. (cited at page 15 and 64 respectively of our opening brief). Particularly we ask the court to compare its reasoning appearing in the latter case in the bottom paragraph at 143 Fed. Rep., page 885. Appellant here urges that the grill member of claims 1-5 be interpolated into generic claims 6-9. In that case there was a similar attempt of appellant to "read into the claims such elements as are therein specified," referring to reading into generic claims elements appearing in the specification and other specific claims. This court there denied the contention of appellant.

Appellant is confronted with the fact that there exists no prior patent or device that contained the combination expressed in claims 6-9. In *extremis* appellant asks that we "set the table of the prior art." In this imaginary table appellant presents numerous prior devices and patents. Thereby appellant confesses in fact the lack of any anticipation in the prior art of claims 6-9. *To constitute an anticipation there must be present on that table* one device *that meets the claims in suit.* Scattering over the table a mass of devices, none of which meets the claims, is an admission

in law that no defense exists. If there is an anticipation why is it not presented alone on the table of the prior art? We cannot imagine a more graphic illustration of a defendant attempting to add and combine various features of prior devices to reinvent the patented combination. This court has oft repudiated such an asserted defense. (See citations at page 45 of our opening brief).

> "* * * it is no defense to a claim of an infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent or publication, and others in another, and still others in a third. It is indispensable that all of them, or their mechanical equivalents, be found in the same description or machine, where they do the same work by substantially the same means." (Citing numerous authorities.)
>
> J. L. Owens v. Twin City Separator Co., 168 Fed. 259 at 265, C. C. A. 8th Cir.

Appellant asserts that the Crompton patent (R. 169-171) discloses the "dominant idea" of the Wright invention. If this is intended to mean that the Crompton patent discloses the combination of claims 6-9 in suit then we deny absolutely the assertion. First let us examine the language and drawings of the Crompton patent.

The Crompton patent was issued by the British patent office and pursuant to the practice in that office contains a "provisional specification" and a "complete specification." The "provisional specification"

was filed May 19, 1893, and the "complete specification" was filed February, 1894. (R. 169). In judging the terms of the Crompton patent it should be borne in mind that these two specifications are separate and distinct and that the latter supersedes the former. That portion of the "complete specification" preceding the reference to the figures of the drawing is a duplication of the "provisional specification."

The Crompton patent recites first that "unsatisfactory results are obtained" with "plain flat electrically heated surfaces." "In order to meet this difficulty" Crompton proposes to "roughen these surfaces." He then states that in some cases we prefer "to use two directly heated surfaces both of which may be formed as above," etc. By "formed as above" the patent clearly refers to making the surfaces rough in lieu of plain flat. This necessarily follows from the presence of the term "above." The sole antecedent for the term "above" is the matter of roughening the cooking surfaces. Clearly this clause is not a direction for mounting two surfaces in box-like casings. A reference to mounting the bottom surface in a casing appears for the first time several paragraphs later in the Crompton patent under reference to figure 1 of the drawings. This structure is therefore referred to "below" and not "above" the aforesaid clause.

In fact the sole description in the Crompton patent of the structure of the "lid" is with reference to the "lid a^x" which is illustrated in figure 3 of the drawings and does not constitute a box-like casing, etc.

We are much surprised at the misleading reference by appellant to figures 4 and 5 of the Crompton drawings. Figure 4 is stated to be "a portion of the *upper surface* of such a heating appliance." This clearly refers to the roughened surface in the lower casing, and not at all to an upper casing. This is established by figure 5 which is stated to be "a side view of figure 4." An examination of figure 5 discloses the roughened surface upon the lower casing. The casing is broken away and is definitely illustrated as being *below* and containing the roughened surface. This is not a view of the "lid" because the "lid" would be upside down with the roughened surface below the casing, if there was one.

We are satisfied that the Crompton patent does not disclose a pair of "pivoted casings" as defined in the Wright patent. We again call to the attention of the court that this is a foreign patent and is to be given effect only as to what is clearly shown. (See authorities cited at page 34 of our opening brief).

In fact Crompton had no conception of a waffle iron whatever. His device could not be used for baking waffles. *It contains no waffle baking members.* The hinges of the Crompton patent render it impossible to bake waffles thereon. Wright was the first to conceive of an electrically heated waffle iron having the elements and features defined in claims 6-9 of his patent. The following elements of the claims in suit are not present in the Crompton device:

1. Waffle baking members.
2. Aluminum cooking surfaces and flanges.
3. An upper casing pivoted to the lower.

Appellant urges that the provision of aluminum surfaces and flanges by Wright does not lend patentability. In fact, Wright was the first to combine an electric heating element and an aluminum cooking surface and encase the same in thin pressed steel casings. Thereby the heat is directed to the waffle batter efficiently and properly due to the conductivity of aluminum. (R. 99). This combination permits the device to be employed on an ordinary house socket, which has a low current as a matter of common knowledge. This combination did not exist in the prior simplex iron. If the baking surface and casing all be cast in one of aluminum it is obvious that the heat will be dissipated throughout the casing. The novel use of aluminum in this combination is patentable.

Walker on Patents, 5th Ed., p. 32.

George Frost Co. v. Samstag, 180 Fed. 739 (C. C. A. 2nd Cir.).

George Frost Co. v. Cohn, 119 Fed. 505 (C. C. A. 2nd Cir.).

Appellant is forced to admit that the Crompton device requires "modifying it in detail" to enable it to perform the function and meet the claims of the Wright invention and patent. Under the established law then the Crompton patent is not an anticipation, because it would require knowledge of the Wright invention to

perceive the necessity or occasion for making the modification. It is elementary that the Wright patent may not be invalidated merely because these modifications appear simple after seeing the Wright invention. In Hobbs v. Beach, 180 U. S. 383, 451 Ed. 586, it was urged that the only modification required to enable a prior device to constitute an anticipation was a simple substitution that any mechanic could make after knowledge of the patented invention. The Supreme Court held that this was no defense and said:

> "* * * the invention consisting rather in the idea that such change could be made than in making the necessary mechanical alterations."

The Supreme Court also used the following language analogous to the ancient grant of the Crompton patent:

> "It appears from the testimony that several of these addressing machines, of which that of Dennis and York is a type, and which are now claimed to have inspired the Beach patent, had been upon the market for many years, and yet it never seems to have occurred to anyone engaged in the manufacture of paper boxes that they could be made available for the purpose of attaching strips to the corners of such boxes. This very fact is evidence that the man who discovered the possibility of their adaptation to this new use was gifted with the prescience of an inventor."

We are surprised to note the denial of appellant that the twenty-two years intervening between the grant of the Crompton period and the Wright invention is

not evidence that it was not an obvious matter to make the necessary modifications in the Crompton patent. The case of Brill v. Washington R. & E. Co. referred to by appellant is a case where the prior patent disclosed the precise patented invention. Therefore, the date of the prior patent was immaterial. That case does not controvert the common sense doctrine that a long period of time intervening between the issuance of a prior patent and the patent in suit indicates that the valuable modifications incorporated in the later patent were not obvious in the prior patent. This is established by the last quotation from Hobbs v. Beach (*supra*). In the opinion of the Supreme Court rendered by Chief Justice Taft on November 7, 1921, in the case of Hildreth v. Mastoras, the court refers to such a delay as demonstrating the *"long delayed and therefore not obvious step."*

The assertion of appellant that it followed the teachings of the Crompton patent is not supported in fact or by the record. Counsel for appellant filed an affidavit in the District Court that appellant never heard of the Crompton patent until after the trial of this case. (R. 164-168).

We believe it clear that the Crompton patent is a familiar example of a defendant in a desperate attempt to invalidate the patent in suit, offering a device long hidden in the art, which device bears mere superficial resemblance to the patented invention in suit. It being the nearest prior art it is much praised and defendant urges that it

might be modified to create an anticipation. This is not a defense. The Crompton patent does not disclose the patented combination. In fairness to appellee we respectfully ask the judges of this court if any of them would purchase a Crompton device to serve the purpose of the Wright waffle iron?

We note the assertions made by appellant concerning the Simplex iron and deem them fully met by our opening brief. (pp. 41-42). Counsel for appellant base their argument on questioning the uncontradicted testimony of their own expert and vice-president of appellant, Mr. Lamb, who admits that the Simplex device is more expensive to make and will not operate on a house current. (R. 65). The Simplex iron lacks the leading and essential elements and features of the Wright invention defined in claims 6-9 in suit.

Much of appellant's argument is based on the fact that Wright has not commercially exploited his invention. We have heretofore pointed out that this is due to defendant's pirating the market and that this suit was filed within fourteen months after the grant of the Wright patent. (Appellee's Opening Brief, pp. 71-73). But commercial exploitation is totally immaterial. In the recent case of Hildreth v. Mastoras (*supra*), Chief Justice Taft says:

> "It is not necessary, in order to sustain a generic patent, to show that the device is a commercial success."

In conclusion we beg to state that the entire argument of appellant is based on the fallacious premise

that the only thing Mr. Wright invented was the specific composite iron and grill device illustrated in the drawings of the patent in suit. In fact the record establishes by uncontradicted documentary evidence that Mr. Wright also invented and placed in practical use his specific waffle iron of plaintiff's exhibit 3 prior to filing application for the patent in suit. Under the law Mr. Wright described one specific form of his invention and gave proper notice to the world by generic claims 6-9 that he desired to cover generically any and all forms. Generic claims 6-9 were granted by the patent office and define a combination that did not exist in the prior art. This combination has been appropriated by defendant.

We submit that the decree of the District Court should be affirmed.

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No. 3716

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a Corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
AUG 10 1921
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3716

United States

Circuit Court of Appeals

For the Ninth Circuit.

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a Corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

JOHN G. BARNES, Esq., Attorney for Plaintiff in Error,

1017 White Building, Seattle, Washington.

ELIAS A. WRIGHT, Esq., Attorney for Defendants in Error,

631 Burke Building, Seattle, Washington.

SAM A. WRIGHT, Esq., Attorney for Defendants in Error,

631 Burke Building, Seattle, Washington.

C. K. POE, Esq., Attorney for Defendants in Error,

405 New York Building, Seattle, Washington.

A. J. FALKNOR, Esq., Attorney for Defendants in Error,

405 New York Building, Seattle, Washingington. [1*]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,

Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

Comes now the plaintiff and for cause of action against the defendants says:

I.

That the plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of New York, with principal place of business in New York City, New York.

II.

That at all times mentioned herein, until within the last year the defendants were husband and wife, doing business as Curtis Studio, and are citizens, residents and inhabitants of King County, Washington, and within the district of the above-entitled court.

III.

That the defendants are wrongfully and unlawfully in possession of a large amount of personal property belonging to the plaintiff, and deny the right of the possession to the plaintiff herein, and wrongfully and unlawfully hold [2] possession of said property in said King County, Washington, in said District, notwithstanding the plaintiff has demanded possession thereof.

IV.

That the property wrongfully held by the defendants consist of the following:

1 motion picture machine re-wind; 2 boxes of lantern slides; 1 net; 2 boxes of phonograph records; 1 camp equipment; 1 box containing clippings, articles and reviews of the North

American Indian; 1 Indian saddle; 1 phonograph; two bundles of 3 tents each; 1 tripod; 1 large cabinet full of reviews of North American Indian; large assortment of motion picture materials and flash powder; 1 typewriter case; 1 box containing records, maps and field material; 1 box containing Indian costume material; 1 box containing Indian reports and files; a large assortment of Indian negatives, transparencies; records and manuscript; 1 box containing Indian clippings with manuscript, descriptive thereof; 1 box containing Indian tents and camp equipment; large assortment of Indian reviews; 1 large assortment of portfolios and books of North American Indian; 4 bookcases and contents; large assortment of Indian baskets; pottery, Indian blankets and Indian curios.

V.

That the aforementioned property is worth the sum of *Ten Thousand* ($10,000.00), and that the defendants refuse to deliver possession to the plaintiff herein.

VI.

That by reason of the wrongful withholding of said possession of said property, this plaintiff has been damaged in the sum of $5,000.00, and will suffer other and greater damage.

VII.

That the said personal property aforementioned has not been taken by the defendants for a tax, assessment or fine pursuant to the statute, or seized

under execution or attachment against the property of this plaintiff.

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, for the recovery of the possession of the said personal property, and in case possession thereof cannot be had, then, for judgment against the defendants [3] in the sum of $10,000.00, the value thereof, and for the sum of $5000.00 damages for wrongfully withholding possession of said property, and for its costs and disbursements in this action.

WRIGHT and WRIGHT,
Attorneys for Plaintiff.

United States of America,
Western District of Washington,—ss.

E. A. Wright, being first duly sworn, on his oath deposes and says:

That the plaintiff is a corporation, organized under the laws of the State of New York; that there is no officer within the State of Washington; that he is authorized as attorney, to make verification on behalf of the plaintiff, because the plaintiff is now within the State of Washington; that he is acquainted with the facts set forth in the complaint herein; knows the contents thereof, and believes the same to be true.

[Seal] E. A. WRIGHT.

Subscribed and sworn to before me this 19th day of April, 1920.

SAM A. WRIGHT,
Notary Public in and for the State of Washington,
Residing in Seattle, Wn.

[Endorsed]: Filed in the United States District Court, Western District of Wash., Northern Division. Apr. 19, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [4]

UNITED STATES OF AMERICA.

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Summons.

The President of the United States of America, GREETING:

To the Above-named Defendants, Edward S. Curtis and Clara J. Curtis, Formerly Husband and Wife, and Curtis Studio.

YOU ARE HEREBY REQUIRED to appear in the United States District Court, in and for the Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above-named

plaintiff, now on file in the office of the clerk of said court, in the City of Seattle, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

WITNESS, the Hon. EDWARD E. CUSHMAN, Judge of said Court, this 19th day of April, in the year of our Lord one thousand nine hundred and twenty, and of our Independence the one hundred and forty-fourth.

[Seal U. S. District Court]

F. M. HARSHBERGER,
Clerk.

By ————————,
Deputy Clerk. [5]

Marshal's Return to Summons.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the within Summons on the therein named Edward S. Curtis, by serving Willis B. Herr, his attorney, on April 19, 1920, by handing to and leaving a true and correct copy thereof with ———, personally, at Seattle, in said District, on the 20th day of April, A. D. 1920.

JOHN M. BOYLE,
U. S. Marshal.
By Thos. Waters,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed Summons and Complaint on the therein named Clara J. Curtis, by handing to and leaving a true and correct copy thereof with her personally at Seattle, Wash., in said District, on the 20th day of April, A. D. 1920.

JOHN M. BOYLE,
U. S. Marshal.
By Edwin R. Tobey,
Deputy.

[Endorsed]: No. 5225. United States District Court, Western District of Washington, Northern Division. The North American Indian, Inc., Plaintiff, vs. Edward S. Curtis et al., Defendants. Summons. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225.

NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Answer of Clara J. Curtis.

The defendant, Clara J. Curtis, answering the complaint of the plaintiff herein, alleges:

I.

She denies each and every of the allegations contained in paragraphs I, II, III, and IV of said complaint and the whole thereof.

II.

That she admits the allegation contained in paragraph V of this complaint that the property theretofore mentioned and described in paragraph IV of the complaint is worth the sum of Ten Thousand Dollars ($10,000), but denies that she ever refused to deliver said property to the plaintiff herein.

III.

She denies each and every of the allegations contained in the VI paragraph of the complaint and the whole thereof; denies that by reason of any act

of the defendant, or at all, plaintiff has been damaged in any sum whatever or at all.

Said defendant further and affirmatively *answer* the complaint of plaintiff alleges:

I.

That the cause of action stated in the complaint of plaintiff [6] herein is barred by the provision of subdivision two of section 159 of Ballinger & Remington Code of the State of Washington.

WHEREUPON defendant prays that she may go hence without day and *that recover* and have rendered in her favor the verdict and judgment required by the statutes of the State of Washington in action for claim and delivery, including also the costs.

JOHN G. BARNES,
Attorney for Defendant, Clara J. Curtis.

State of Washington,
County of King,—ss.

Clara J. Curtis, being first duly sworn, on oath says: I am one of the defendants in the foregoing action; I signed the foregoing answer, that I have read the foregoing answer, know the contents thereof, and believe the same to be true.

CLARA J. CURTIS.

Subscribed and sworn to before me this 20th day of May, 1920.

JOHN G. BARNES,
Notary Public in and for the State of Washington.

I hereby designate Room No. 1017, White Building, 4th & Union Street, Seattle, Washington, as

the place where all subsequent papers herein, except writs and process, may be made upon the defendant Clara J. Curtis herein, and consent that service of all subsequent papers herein, except writs and process, may be made as the place hereinabove designated upon the said Clara J. Curtis.

Dated May 20, 1920.

JOHN G. BARNES,
Clara J. Curtis' Attorney.

Service of within answer and receipt of copy admitted this 20th day of May, 1920.

WRIGHT & WRIGHT,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 20, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

United States District Court for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Separate Answer of Defendant, Edward S. Curtis.

Comes now the defendant, Edward S. Curtis, by his attorneys, and for answer to the complaint herein alleges:

I.

Referring to Paragraph III of the complaint, this defendant denies that he was wrongfully or unlawfully in possession of the personal property described in the complaint, which he admits belongs to and is owned by the plaintiff, and he further denies that he wrongfully or unlawfully held possession of said property.

II.

Referring to Paragraph V, this defendant denies that the property described therein is worth the sum of Ten Thousand Dollars ($10,000.00).

III.

Referring to Paragraph VI, this defendant denies that by reason of the withholding of possession of said property, the plaintiff has been damaged in the sum of Five Thousand Dollars ($5,000.00) or in any other sum or amount whatsoever.

WHEREFORE, having fully answered, this defendant prays he be hence dismissed with his costs herein to be taxed.

HERR, BAYLEY & CROSON,
Attorneys for Defendant Edward S. Curtis. [8]

United States of America,
Western District of Washington,—ss.

Willis B. Herr, being first duly sworn, on oath deposes and says: That he is one of the attorneys

for the defendant, Edward S. Curtis; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true. That he makes this verification on the ground and for the reason that the said defendant, Edward S. Curtis, is temporarily absent from the county of King, State of Washington, and is therefore unable to verify this answer.

WILLIS B. HERR.

Subscribed and sworn to before me this 26th day of May, 1920.

[Notary Seal] OFELL H. JOHNSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of the within answer received, and due service of same acknowledged this 26th day of May, 1920.

WRIGHT & WRIGHT,
Attys. for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [9]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendant.

Amended Reply.

Comes now the plaintiff and for amended reply to the answer of the defendant, Clara J. Curtis, says:

I.

Plaintiff denies each and every allegation set forth in Paragraph 1 of the defendant Clara J. Curtis' alleged affirmative answer, and each and every part thereof.

For further reply, plaintiff says:

I.

That the defendant, Clara J. Curtis, is estopped to plead the statute of limitations set forth in her answer, and to deny that the plaintiff is a corporation organized under the laws of the State of New York, having enjoyed and received the benefits of the property of the plaintiff and dealt with it for a number of years.

WHEREFORE, having fully replied, plaintiff prays as by its complaint herein.

WRIGHT & WRIGHT,
Attorneys for Plaintiff.

Received copy this 18th day of June, 1921.

JOHN G. BARNES,
Attorney for Clara J. Curtis. [10]

State of ———,
United States of America,
Western District of Washington,—ss.

E. A. Wright, being first duly sworn, on his oath, deposes and says:

That the plaintiff is a corporation, organized under the laws of the State of New York; that there is no officer within the State of Washington; that he is authorized as attorney to make verification on behalf of the plaintiff, because the plaintiff is not within the State of Washington; that he is acquainted with the facts set forth in the amended reply herein; knows the contents thereof, and believes the same to be true.

E. A. WRIGHT.

Subscribed and sworn to before me this 18th day of June, 1920.

[Notary Seal] SAM A. WRIGHT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Affidavit of Replevin.

United States of America,
Western District of Washington,—ss.

Elias A. Wright, being first duly sworn, on his oath, deposes and says:

I. That I am one of the attorneys for the plaintiff in the above-entitled action.

II. That the said plaintiff is the owner of and is lawfully entitled to the possession of the following described personal property:

1 motion picture re-wind; 2 boxes of lantern slides; 1 net; 2 boxes of phonograph records; 1 camp equipment; 1 box containing clippings, articles and reviews of the North American Indian; 1 Indian saddle; 1 phonograph; two bundles of 3 tents each; 1 tripod; a large cabinet full of reviews of North American Indian; 1 large assortment of motion picture materials and flash powder; 1 typewriter case; 1 box con-

taining records, maps and field material; 1 box containing Indian costume material; 1 box containing Indian reports and files; a large assortment of Indian negatives, transparencies; records and manuscript; 1 box containing Indian clippings with manuscript, descriptive thereof; 1 box containing Indian tents and camp equipment; large assortment of Indian reviews; large assortment of portfolios and books of North American Indian; 4 bookcases and contents; large assortment of Indian baskets; pottery, Indian blankets and Indian curios.

III. That the said property is in the possession of and wrongfully detained by the said defendants from the said [12] plaintiff.

IV. That the property has not been, nor any part thereof, taken for a tax, assessment or fine, pursuant to the statute, or seized under execution or attachment against the property of the said plaintiff.

V. That the actual value of the whole of said property is the sum of Ten Thousand ($10,000.00) Dollars.

ELIAS A. WRIGHT.

Subscribed and sworn to before me this 19th day of April, 1920.

[Notarial Seal] SAM A. WRIGHT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Apr. 19, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

COPY.

60469. 20,000.00.

In the United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Bond for Replevin.

WHEREAS, it is alleged by the plaintiff in the above-entitled action that the defendants therein have in their possession and wrongfully detain certain personal property belonging to said plaintiff, to the possession of which the said plaintiff is lawfully entitled, of the value of Ten Thousand and no/100 ($10,000) Dollars;

WHEREAS, the said plaintiff, being desirous of having the said personal property delivered to it, has delivered to the United States Marshal of the Western District, Northern Division, the proper

affidavit, and required him to take the said property from said defendants:

NOW, THEREFORE, we, The North American Indian, Inc., as principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, in consideration of the premises and of the delivery to said plaintiff of said property, do hereby undertake and acknowledge that we are jointly and severally bound to said defendants in the sum of Twenty Thousand and no/100 ($20,000.00) Dollars (being double the value of said property, as stated in said affidavit), for the prosecution of the said action, for the return of said property to said defendants if return thereof be adjudged, and for the payment to said defendants of such sum as may from any cause be recovered against the said plaintiff.

WITNESS our hands and seal this 19th day of April, 1920.

THE NORTH AMERICAN INDIAN, INC.,
By ELIAS A. WRIGHT,
Atty.

UNITED STATES FIDELITY & GUARANTY COMPANY,
D. H. McCOLLISTER,
Attorney in Fact.

[Corporate Seal of U. S. F. & G. Co.]

Executed in presence of

Approved:

JEREMIAH NETERER,
Judge. [14]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 19, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Order Directing Issuance of Writ of Replevin.

The above-entitled matter coming on regularly for hearing on the application of the plaintiff for an order directing the issuance of writ of replevin herein, and it appearing from the plaintiff's complaint herein on file and the affidavit in support thereof that the cause of action for replevin is stated therein, and it further appearing that the plaintiff has furnished good and sufficient bond to the defendants in this action, now, therefore, it is hereby

ORDERED that writ of replevin issue in this action directed to the marshal to take possession of the property.

Done in open court this 19th day of April, 1920.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 19, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Writ of Replevin.

To the United States Marshal, of the Above-named District, *READING:*

In the name of the United States of America, you are hereby commanded to take the personal property mentioned and described in the accompanying affidavit from the defendants and deliver the same to the plaintiffs, a bond having been duly filed by the

plaintiff to the defendants herein, unless before such delivery the defendants enter into sufficient bond for the delivery thereof to the plaintiff, if delivery be adjudged.

WITNESS the Honorable JEREMIAH NETERER, Judge of the said court, this 19th day of April, in the year of our Lord nineteen hundred and twenty, and of our Independence the 144th.

[Seal U. S. District Court]

F. M. HARSHBERGER,
Clerk.

MARSHAL'S RETURN, WESTERN DISTRICT OF WASHINGTON.

I hereby certify and return that, on the 19th day of April, 1920, I served the within writ of replevin on the within named Edward S. Curtis, by serving Willis B. Herr, his attorney. And I took the personal property listed on attached paper. Said personal property now stored #64 Cobb Bldg., in charge of George W. Slade.

JOHN M. BOYLE,
United States Marshal.
By Thos. Waters,
Deputy U. S. Marshal. [17]

1 Motion Picture Re-wind.
2 Boxes Lantern Slides.
1 Camp Equipment.
1 Box Containing Clippings, Articles and Reviews of "North American Indian."
2 Bundles of Three Tents Each.

1 Large Cabinet Full of Reviews of North American Indian.
1 Large Assortment of Motion Picture Material and Flash Powder.
1 Typewriter Case.
1 Box Containing Records, Maps and Field Material.
1 Box Containing Indian Costume Material.
1 Box Containing Indian Maps and Files.
1 Large Assortment of Indian Negatives, Transparencies, Records, and Manuscripts.
Assortment of Negative and Positive Plates 6½x8½, Size Indian Subjects, Numbering from 1 to 38000, as Listed in Four Record Books of Corresponding Numbers.
729 Negative and Positive Plates 14x17.
51 Negative and Positive Plates 18x22.
19 Negative and Positive Plates 16x20.
1 Box Containing Indian Clippings with Manuscript Descriptive Thereof.
1 Box Containing Indian Tents and Camp Equipment.
1 Large Assortment of Indian Reviews.
1 Large Assortment of Portfolios and Books of North American Indian.
16 Large Bound Portfolios.
19 Volumes of "North American Indian," ¾ Morocco.
6 Volumes of "North American Indian," in Cloth.
1 Package of Folio Prints.
1 Small Package of Prints.
Assorted Portfolio Prints Unbound.

1 Volume of Indian Days Long Ago—In Cloth.
4 Bookcases and Contents.
1 Large Assortment of Indian Baskets, Pottery and Indian Curios.

I, Thos. Waters, the officer who executed the within writ, do swear that the above is a correct and detailed list of all property taken under the within writ.

THOS. WATERS,
Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

MARSHAL'S AMENDED RETURN.

I hereby certify and return that, on the 19th day of April, 1920, I served the within writ of replevin on the within named Edward S. Curtis, by serving Willis B. Herr, his attorney, in the City of Seattle, Washington. And I took the personal property, located in Seattle, Wash., in said District, as listed above. Said personal property now stored #64 Cobb Bldg., in charge of George W. Slade.

JOHN M. BOYLE,
United States Marshal.
By Thos. Waters,
Deputy U. S. Marshal. [18]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 14, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed writ of replevin on the therein named Clara J. Curtis, by handing to and leaving a true and correct copy thereof with her personally at Seattle, Wash., in said District, on the 28th day of April, A. D. 1920.

JOHN M. BOYLE,
U. S. Marshal.
By Edwin R. Tobey,
Deputy.

RETURN ON SUPPLEMENTAL SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed writ of replevin and affidavit for replevin and a copy of the bond on the therein named Clara J. Curtis by handing to and leaving true and correct copy thereof with her personally at Seattle, in said District, on the 20th day of April, A. D. 1920.

JOHN M. BOYLE,
U. S. Marshal.
By Edwin R. Tobey,
Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 11, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Special Appearance and Motions to Dismiss of Clara J. Curtis.

Comes now the above-named defendant, Clara J. Curtis, by John G. Barnes, her attorney, and appearing specially herein for the purposes of these motions only, and not appearing generally herein, but agreeing that if the special purposes for which this special appearances are made shall not be sanctioned or sustained by the Court, she will appear generally within the cause within the time allowed therefor *allowed* by law, or by order of the Court, or by stipulation of the parties, moves the Court:

1. To dismiss this action, and that she take her costs in this suit incurred, for the reason that as appears by the complaint of the plaintiff filed in the cause, that the residence of any of the defendants, and particularly the residence of this defendant, is not alleged in the complaint herein; nor is it alleged in the complaint herein that this defendant is a citi-

zen of the State of Washington, and therefore no diversity of citizenship exists, upon which basis alone the Court can have jurisdiction in this cause.

2. To quash and annul the writ of replevin issued in the cause on the 19th day of April, 1920, for the reason that this court was wholly without jurisdiction to issue said writ of replevin.

3. To quash and annul the execution of the writ of replevin issued in this cause and executed by the United States Marshal on the 19th day of April, 1920, for the reasons: 1. That the affidavit upon which said writ was issued did not allege the location of the property described [20] therein to be within the jurisdiction of this court; 2. That the bond upon which the writ of replevin was issued and executed by the marshal was not filed with the marshal of this district, nor ever approved by him; 3. That no service of the affidavit or bond under which said writ of replevin herein was issued and executed, was ever made upon this defendant.

WHEREFORE, this defendant prays that the writ of replevin issued herein, and its execution by the marshal, be both quashed and annulled, and said marshal ordered to forthwith return all the property he took under the writ of replevin to the place from whence he took it.

These motions are all based upon the files and records of this court in this cause.

JOHN G. BARNES,

Attorney for Clara J. Curtis, One of the Defendants.

Service of within motions, etc., and receipt of copy admitted this 10th day of May, 1920.

WRIGHT & WRIGHT,
Attorneys for Plaintiff.

I hereby designate Room No. 1017, White Building, 4th Ave. at Union Street, Seattle, Washington, as the place where all subsequent papers herein, except writs and process, may be made upon the atty. herein, and consent that service of all subsequent papers herein, except writs and process, may be made at the place hereinabove designated upon the said John G. Barnes.

Dated May 10th, 1920.

JOHN G. BARNES,
Clara J. Curtis' Attorney.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 10, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Order Denying Motion of Clara J. Curtis to Dismiss Action.

This cause came on duly and regularly for hearing on the 17th day of May, 1920, on the special appearance and motions of the defendant Clara J. Curtis to dismiss the action, to quash the writ of replevin issued herein, annul its execution by the marshal, and order him to forthwith return all the property he took under said writ of replevin to the place from whence he took it. The plaintiff appeared by Messrs. Wright & Wright, its attorneys, and the defendant Clara J. Curtis appeared by John G. Barnes, her attorney. After argument by the respective counsel, the Court being fully advised in the premises, it is by the Court

ORDERED, that the said motion of the defendant Clara J. Curtis to dismiss this action be, and the same is hereby denied, and that the plaintiff be, and it is hereby permitted to amend its complaint herein by interlineation in the original on file herein. It is further

ORDERED, that the motions of the defendant Clara J. Curtis to quash and annul the writ of replevin, and the execution thereof by the United States Marshal, issued and executed on the 19th day of April, 1920, be, and each of them is, hereby denied.

To which rulings and orders of the Court, and to each and every of them, the defendant Clara J. Curtis, by her attorney, excepted, and her exception is hereby allowed.

It is further ORDERED that the foregoing be made and entered [22] as of the 17th day of May, 1920.

Done in open court this third day of January, 1921.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court, Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN*S*,
Plaintiff,

vs.

EDWARD S. CURTIS, CLARA J. CURTIS, and CURTIS STUDIO,
Defendants.

Trial Showing Empanelment of Jury.

Now, on this 5th day of November, 1920, this cause comes on for trial with Wright & Wright and A. J. Falknor, attorneys for plaintiff, and John G. Barnes and Herr Bayley & Croson, appearing for defendants. Both sides being now ready to proceed, the following jurors are selected, being twelve good and lawful men, sworn and empaneled as fol-

lows: P. A. Hallberg, R. M. Evans, G. G. Startup, Franz Ritchter, Fred Taggart, W. D. Allen, Harold E. Pearce, V. G. Gilbreath, J. B. Shaner, Geo. E. Patton, Wm. V. S. Robb and J. J. Stockand. Opening statement is made by counsel for plaintiff. Witnesses for plaintiff being duly sworn and examined are Lewis Albert and W. Albee. Plaintiff's exhibits, 35 in number, and Defendants' Exhibit "A" are introduced in evidence. It now being twelve o'clock A. M. recess is declared by the Court and the jury, being duly cautioned and admonished, it is adjourned till 2 P. M. Court again comes into session, all parties being present and all jurors present and in their box, trial is now resumed. Witnesses for plaintiff being duly sworn and examined are: Agness Shorthill, Lewis Albert (recalled), B. S. Patton, Jno. G. Barnes, W. B. Herr and Edward S. Curtis. Plaintiff rests. Defendant makes opening statement. Lewis Albert, witness for defendant is duly sworn and examined. Defendant rests. Jury is excused for motion. Whereupon motion is made by plaintiff for instructed verdict. Whereupon it is argued and said cause is continued until Tuesday. Jury in this cause is excused until Tuesday, after being duly cautioned and admonished.

Journal #8, Page 491. [24]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a Corporation,

Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

Petition to Add Additional Plaintiffs.

Comes now E. S. Pegram, a citizen and resident of the State of New York, and Gutson Borglum, a citizen and resident of the State of Connecticut, and petition the Court as follows:

I.

That they are the sole and only directors and Trustees of The North American Indian, Inc., a corporation, the plaintiff herein.

II.

That they ask to be added as plaintiffs herein for the purpose of protecting the property and rights of the plaintiff herein.

WHEREFORE petitioners ask that they be added as plaintiffs herein.

WRIGHT and WRIGHT and
POE and FALKNOR,
Attorneys for Petitioners.

United States of America,
Western District of Washington,—ss.

Elias A. Wright, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the petitioners herein; that he makes this verification for and on behalf of the petitioners herein on the ground and for the reason that they are absent from the State of Washington; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

ELIAS A. WRIGHT. [25]

Subscribed and sworn to before me this 8th day of November, 1920.

[Notary Seal] SAM A. WRIGHT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 9, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a Corporation,

Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

Order Adding Additional Plaintiffs.

IT IS HEREBY ORDERED, that E. S. Pegram, a resident of the State of New York, and Gutson Borglum, a resident of the State of Connecticut, being the sole directors of the plaintiff herein, are hereby added as plaintiffs in the above action.

Done in open court this 9th day of November, 1920.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 9, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a Corporation,

Plaintiff,

vs.

E. S. PEGRAM and GUTSON BORGLUM,

Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

Verdict.

We, the jury in the above-entitled cause, do hereby find that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the Marshal, now located in Room 64 Cobb Building, Seattle, Washington, except the following:

No. 1. Mimeograph No value
No. 2. Three printing-frames.....Value $5.00
No. 3. Small box containing cancelled checks No value
No. 4. One box containing portrait proofs No value
No. 5. One box containing fishnets....Value $2.00

No. 6. One box containing burlap.....Value $2.50
No. 7. Twenty-nine large negatives of
Roosevelt family.....Unknown value
One small Roosevelt negative
Five negatives of women [28]
One red pocketbook, about 150
years old.....Unknown value

Being instructed by the Court so to do.

W. D. ALLEN,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 9, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a Corporation,

Plaintiff,

E. S. PEGRAM and GUTSON BORGLUM,

Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

Judgment on the Verdict.

The above-entitled matter having come on regularly for hearing before the Honorable E. E. Cushman, Judge of the above-entitled court, on the 5th day of November, 1920, in the Federal Court Building at Seattle, Washington, in the above-entitled District, before a jury of twelve, good and *qualified chosen* from the District, the plaintiffs appearing with their witnesses and attorneys, Elias A. Wright of the firm of Wright & Wright, and A. J. Falknor of the firm of Poe & Falknor; and the defendant, Edward S. Curtis, appearing in person and by his counsel, W. B. Herr, of the firm of Herr, Bayley & Croson; and the defendant, Clara J. Curtis, appearing in person with her witnesses and attorney, John G. Barnes; and evidence having been introduced by the plaintiffs to substantiate their cause of action and the defendant, Clara J. Curtis, in support of her defense thereto—the defendant, Edward S. Curtis, offering no testimony; and at the close of all of the testimony, the plaintiff, The North American Indian, Inc., a corporation, moved the Court for an instructed verdict for all of the property seized by the Marshal, as shown by the writ of replevin herein and the Marshal's return [30] thereon and now located and situated in Room 64 Cobb Building in Seattle, King County, State of Washington, in the District of the United States District Court above entitled; thereafter the Court, on the application of E. S. Pegram and

Gutson Borglum, as directors and trustees of the plaintiff corporation, they were added as additional plaintiffs under order of the Court herein jointly with the original plaintiff, and thereafter the Court duly considered—after argument of counsel—the motion of the plaintiffs for an instructed verdict herein, and granted the same, and directed the jury to return a verdict for the plaintiffs for all of the property replevined by the plaintiff and seized by the marshal and now located in Room 64 Cobb Building, Seattle, King County, Washington, in the above-entitled Federal District, save and except certain property as shown by the verdict, the motion of the defendant Clara J. Curtis having been denied and her exception allowed,

NOW, THEREFORE, in pursuance of said motion and directed verdict heretofore duly returned and filed in this court by direction of this Court, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the plaintiff and seized by the Marshal and now located in Room 64, Cobb Building, in Seattle, King County, Washington, in the above-entitled Federal District, save and except the following:

No. 1. Mimeograph No value
No. 2. Three printing-frames.....Value $5.00
No. 3. Small box containing cancelled checks No value
No. 4. One box containing portrait proofs No value

No. 5. One box containing fishnets...Value $2.00
No. 6. One box containing burlap....Value 2.50
No. 7. Twenty-nine large negatives of
Roosevelt family..Unknown value [31]
One small Roosevelt negative
Five negatives of women
One red pocketbook, about 150
years old Unknown value

which said excepted property the plaintiffs are hereby ORDERED to return to the Curtis Studio, the place from whence it was seized, or, in the event of their failure so to do, that they pay to the defendants the sum of nine and 50/100 ($9.50) Dollars, the value of said property, and it is further

ORDERED, ADJUDGED and DECREED, the plaintiffs having waived their costs as against the defendants as a condition for the adding of the additional plaintiffs, E. S. Pegram and Gutson Borglum, that none of the parties recover costs as against the other herein.

Done in open court this 20th day of December, 1920.

EDWARD E. CUSHMAN,
Judge.

Receipt of a copy of the within form of judgment service admitted this 9th day of Nov. 1920.

JOHN G. BARNES,
Attorney for Deft. Clara J. Curtis.
HERR, BAYLEY & WILSON,
Attys. for Edw. S. Curtis.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1920. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [32]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Bill of Exceptions.

JOHN G. BARNES,
Attorney for Defendant Clara J. Curtis,
507 Marion Building, Seattle, Washington. [33]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Bill of Exceptions Proposed by Defendant Clara J. Curtis.

BE IT REMEMBERED, that the above-entitled cause came on for trial on the fifth day of November, 1920, being one of the days of the November term of said Court, before the Hon. Edward E. Cushman, one of the Judges of said court, and a jury impaneled. The plaintiff appeared by its attorneys and counsel, Elias Wright, of Wright & Wright, and A. J. Falknor, of Poe & Falknor; the defendant, Edward S. Curtis, appeared in person and by Willis B. Herr, of Herr, Baley & Croson, his attorneys and counsel, and the defendant Clara J. Curtis appeared in person and by John G. Barnes, her attorney and counsel.

The plaintiff to maintain its case offered the following evidence, to wit:

Testimony of Lewis Albert, for Plaintiff.

LEWIS ALBERT, a witness called by plaintiff, being first duly sworn, was interrogated by A. J. Falknor, attorney for plaintiff, and testified:

"I reside in New York City. I am the manager of the North American Indian. I have held the position of manager for about ten years. I am familiar with the signatures of Edward S. Curtis, Mr. Morris and F. Gordon Brown. The signatures on the instrument you show me are those of Edward S. Curtis, Robert C. Morris, who was the vice-president of the corporation at that time, and F. Gordon Brown, who was secretary at that time."

Mr. FALKNOR.—We offer in evidence the bill of sale dated the 21st day of December, 1909. [34]

The COURT.—It may be admitted.

Mr. BARNES.—I would like the privilege of examining it.

The COURT.—You have been all over this at the other trial, and I think you should be able to make your objection promptly without taking time to examine the papers. You have already examined them thoroughly.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Thereupon the document referred to was admitted in evidence, marked Plaintiff's Exhibit 1, and read to the jury by Mr. Falknor.

Mr. FALKNOR.—Mr. Albert, I show you this instrument which we will have marked Plaintiff's

(Testimony of Lewis Albert.)

Exhibit 2; I will ask you whose signature is attached to that instrument as the maker.

A. Edward S. Curtis.

Q. That is the defendant in this case?

A. Yes, sir.

Mr. FALKNOR.—We offer this in evidence as one of the assignments of the copyright to the plaintiff corporation.

Mr. BARNES.—The defendant, Clara J. Curtis, objects to the introduction of this exhibit for the reason that it is immaterial and irrelevant, and that there is no issue raised in this case as to the ownership of the copyrights. I wish to argue that.

The COURT.—I have heard from you enough on that. This assignment of copyright may tend to identify what passed under the bill of sale and contract. The objection is overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Mr. BARNES.—May I say one word to your Honor?

The COURT.—Yes, sir.

Mr. BARNES.—Might I be allowed to suggest to your Honor that a copyright is not subject to the action of replevin at all. [35]

The COURT.—As I intimated, the copyright may identify the plates, the positives and negatives, that did not pass under the bill of sale.

Mr. BARNES.—Note an exception.

(Testimony of Lewis Albert.)

The COURT.—Exception allowed. *I* may be admitted in evidence, and marked Plaintiff's Exhibit 2.

Thereupon the paper referred to was admitted in evidence, and marked Plaintiff's Exhibit 2.

The plaintiff thereupon identified the signature of Edward S. Curtis upon each of Plaintiff's Exhibits 3, 4, 5 and 6, by the witness, and offered the same in evidence. The defendant Clara J. Curtis objected to the admission in evidence of each and every of said exhibits, upon the grounds that the same were incompetent, irrelevant and immaterial, and did not go to any of the issues raised in this case, but the Court overruled each and every of said objections, each of said documents were admitted in evidence, and marked Plaintiff's Exhibit 3, 4, 5, and 6, respectively, to which rulings of the Court, in each and every instance, the defendant Clara J. Curtis, by her attorney, excepted, and her exceptions were allowed by the Court.

Mr. FALKNOR.—I show you this, and ask you whose signature is to that?

A. E. S. Curtis.

Q. The defendant in this case? A. Yes, sir.

Mr. FALKNOR.—We offer this in evidence, and ask that it be marked Exhibit 7.

Mr. BARNES.—The defendant Clara J. Curtis objects to the introduction of this instrument, for the reason that it is incompetent, immaterial and irrelevant, and goes to none of the issues in this case. It purports to have been made on the 29th

(Testimony of Lewis Albert.)

day of September, 1920. This action was instituted in this court on the 19th day of April, 1920. Certainly an assignment made five months [36] after the commencement of this action cannot have any bearing.

The COURT.—Objection overruled. Exception allowed. It may be admitted.

Thereupon the paper referred to was admitted in evidence, and marked Plaintiff's Exhibit 7.

Mr. FALKNOR.—I now offer in evidence a certified list, showing the dates and title of the various copyrights, and filing of the same for copyrights by the registrar in the copyright office.

Mr. BARNES.—We object to the introduction of this so-called list of copyrights, for the following reasons: First, because it is incompetent, irrelevant and immaterial. It does not go to any of the issues raised by the pleadings in this case, and secondly, because it is not properly authenticated, or is not an *e*mplified copy such as is permitted to be introduced in evidence under the statutes of the United States relating thereto.

The COURT.—I will overrule this objection.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

The witness was thereupon interrogated by Mr. Barnes upon cross-examination, and testified:

"Since about December, 1909, I have been continuously, and am now, the manager of the plaintiff corporation in this case, I handle everything that

(Testimony of Lewis Albert.)

pertains to the New York office, and the New York office is the only office there is."

Mr. BARNES.—Who appointed you manager?

Mr. FALKNOR.—I object to that.

The COURT.—Objection sustained.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. How did you acquire the office of manager of the corporation?

Mr. FALKNOR.—I object to that as being immaterial. [37]

The COURT.—Objection sustained.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. Who employed the Messrs. Wright & Wright to bring this action?

Mr. WRIGHT.—I object to that as being immaterial.

The COURT.—Objection sustained.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. You testified in this case on its former trial, didn't you, Mr. Albert?

A. Yes, sir.

Q. You came from New York City for that purpose, did you not?

Mr. WRIGHT.—I object to that as being immaterial.

The COURT.—Objection sustained.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

(Testimony of W. Albee.)

Q. Mr. Albert, you paid your expenses when you came out here?

Mr. WRIGHT.—I object to that as being immaterial in every respect.

The COURT.—Objection sustained. Exception allowed.

Testimony of W. Albee, for Plaintiff.

W. ALBEE, a witness called by plaintiff, being duly sworn, was interrogated by A. J. Falknor, attorney for plaintiff, testified:

"I am a photographer. Place of business, 1006 Lowman Building."

Q. Since the other trial, were you appointed by his Honor, the Judge—

Mr. BARNES.—I object to that question. It is not fair and it is not right. It is not legal. He has no right to make it. I think the records of this court will disclose it.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. Since the other trial, I would like to ask you if you were [38] selected by his Honor, and appointed by his Honor, to make a check of the photographs, plates, and material, the title to which is involved in this controversy?

A. Yes, sir.

Mr. BARNES.—I object to that.

The COURT.—I think the order as to the examination of those in the custody of the marshal, that

(Testimony of W. Albee.)

you have a right to pass on, and say they are in controversy here. I think you better confine the question to those in possession of the marshal.

Mr. FALKNOR.—I meant that. It is the material, I understand, that is in the possession of the marshal, or in control of the marshal at room 64 Cobb Building.

Mr. BARNES.—There is not any material, and has not been since the 19th day of May, in the possession of the marshal.

The COURT.—Repeat the question.

Q. I will ask you if since the other trial, you were appointed by his Honor to tabulate, and identify the property that is in the possession of the marshal in this case, that is situated in room 64 of the Cobb Building?

Mr. BARNES.—I object to that question as being incompetent, irrelevant and immaterial, and not the best evidence.

The COURT.—The objection is overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed. Proceed with the examination.

The witness then testified:

"I proceeded to carry out the Court's order to the best of my ability. I had there when I made the check the assignment of the various copyrights. I had certified copies of Exhibits 1 and 2, and had Exhibits 4, 5 and 6, and other data."

Mr. FALKNOR.—We offer these two in evidence as connecting up Mr. Albee's testimony.

(Testimony of W. Albee.)

They are certified copies of Exhibits 2 and 3 which we have already introduced in evidence. [39]

Mr. BARNES.—The defendant Clara J. Curtis objects to this as being incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. Exception allowed.

Paper referred to admitted in evidence, and marked Plaintiff's Exhibits 8 and 9.

Q. Mr. Albee, will you explain, with this information in your possession, what you did?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. The disposition that I made of the negatives?

Q. Yes, sir. Tell what you found, and what you did.

A. I was notified by the corporation that I have been appointed by the Court to check certain negatives in a certain room in the Cobb Building, together with certain data which I was given at the same time, together with the key to the room in the building, room 64 of the Cobb Building, and, owing to the thousands of negatives which it was necessary to check, I was unable to handle all of the negatives personally, and I engaged an assistant to help me in the physical handling of the glass, and the assistant and myself, over a period of three months, checked the negatives which were in the Cobb

(Testimony of W. Albee.)

Building, comparing the negatives with the typewritten lists which were furnished us, and as the negatives tallied with the lists, we would make check marks on the lists, and segregate those especial negatives. The negatives were bound, as the negatives tallied, I would make a check mark on my list, place my initials on the negatives, and as the negatives so accumulated, packages of a dozen, ten or twelve, in some instances, they were bound with adhesive tape and put in another portion of the room from the portion of the room in which the unchecked negatives were. [40] The checked negatives are now in room 64 of the Cobb Building, and in three situations. There is a cupboard in the room which is filled to its capacity with negatives, each negative having my initial on it, and being bound with Addison's adhesive tape, and upon a shelf in the same room, without doors, there are more negatives, and up in the adjoining room, separated by a temporary partition, are negatives which are not bound, because the time did not permit the binding of all the negatives before court opened, and consequently those, no doubt, have my initials on them, but are not bound. By checked negatives I mean those which in my opinion, and as far as my honest and earnest endeavor goes, tally with the typewritten lists which were furnished, the tally and number of the negatives. Those that correspond with the detailed lists furnished me on the assignment with these copyrights. I compared all the negatives with the numbers on Exhibit 8, and in

(Testimony of W. Albee.)

every instance where there was not a negative corresponding with the number, I will say this, that the negatives which were checked can be—can all be found on the list; but this list has many numbers which are not checked, because I was unable to locate the negatives.

Q. The negatives that are there are included in these lists, but this list is more extensive than the negatives, but whatever negatives are checked are in this list?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and leading.

The COURT.—It was leading, but the witnesses answer had been ambiguous in the beginning, so I will allow the question to straighten up what he answered.

Mr. BARNES.—I have my exception, of course.

The COURT.—Exception allowed.

A. Yes, sir.

Q. I will ask you if there are photographs, negatives, positives, plates there, that are not copyrighted. [41]

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, no sufficient foundation laid for this witness to say whether they are copyrighted, or not.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. There are certain negatives contained in the room which are not copyrighted, but as far as my

(Testimony of W. Albee.)

judgment in the matter is concerned, I have checked no negatives and plates, and my initials are on no negatives which are not copyrighted.

Q. Did you find any negatives, or positives, in the property that is stored there that is not of an Indian character? A. Yes, sir, I did.

Q. What did you find?

A. I found certain negatives of Theodore Roosevelt.

Q. How many?

A. I didn't count them, because I was told by the Court that the Indian negatives are those in question. I saw them segregated in a box, but I did not examine them, except to ascertain the nature of the negatives. Outside of those I did not find any negatives or positives, or plates, or material, that was not of an Indian character, or nature. I have heard of the North American Indian Publication, and have noticed magazine articles dealing with it. I have not followed it carefully, or extensively, at all.

Q. Did you find any material there that was not consistent, or adapted to such work?

A. No, sir.

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—The objection is overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. No, sir. [42]

The witness was thereupon interrogated by Mr.

(Testimony of W. Albee.)

Barnes, upon cross-examination, and testified as follows:

"I was given the key to room 64 in the Cobb Building by Mr. Elias Wright, attorney for the North American Indian Company. Mr. Wright informed me that I had been appointed by the Court. I think it was in July. Since that time I have been in constant consultation with Mr. Wright. He supplied me with the lists and the data. I think my initial visit to room 64 was in July, at which time I made a cursory examination of the contents of the room, but did not begin the actual checking until about two weeks later."

Q. Did you find anybody else in possession of the property in room 64 when you were in there?

Mr. FALKNOR.—I object to that as being immaterial.

The COURT.—Objection overruled.

A. The work was done, my actual checking of the work, in the evening. I was given one key, but I have no reason to believe that there weren't other keys in existence.

Q. Isn't it a fact that you found a man, by the name of N. Lennes, in possession of room 64, and of the material in there?

A. He was in the room, yes. He and I have been in the room at the same time.

Q. And you had a conversation with him with relation to this property?

Mr. FALKNOR.—What difference does that

(Testimony of W. Albee.)

make, after we own the property, if there were forty people in it?

The COURT.—The objection is sustained.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. You did find N. Lennes there, did you?

A. He was in the room.

Q. He had a key to the room, didn't he?

A. Yes, sir, as far as I know. [43]

Q. And you found a dark room there, didn't you?

Mr. FALKNOR.—I object to that.

The COURT.—Objection sustained.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. You found a large supply of chemicals there, didn't you?

Mr. FALKNOR.—I object to that.

The COURT.—Is this something that you claim was done that should not have been done?

Mr. FALKNOR.—No, I don't think so.

The COURT.—The objection is sustained. Exception allowed.

Q. You found an 11x14 camera there, didn't you?

Mr. FALKNOR.—Do they claim the camera? There is no controversy over that. I object to that as being immaterial.

The COURT.—Do you claim it?

Mr. WRIGHT.—No.

The COURT.—Was it taken; was it something that was taken?

(Testimony of W. Albee.)

Mr. FALKNOR.—No, I don't think so. I don't think it is claimed by anybody.

The COURT.—The objection is sustained.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. You found a large assortment of photographic trays, photographic trays, developing trays, didn't you?

A. There was no such paraphernalia in the room. I imagine there might have been among them printing trays. The room was a sort of a heterogenous mass of material.

Q. There are three rooms, all entered by door 64, and that is the only entrance to them?

A. Yes, sir. In the strict interpretation of the term, there is only one room, and temporary partitions running to the ceiling.

Q. Making three different rooms? [44]

A. Yes, sir.

Q. And this camera, and this dark room, and those negatives and chemicals were in the north room, were they not?

Mr. FALKNOR.—I object to that as being immaterial.

The COURT.—Objection sustained. Exception allowed as to those chemicals.

The witness, on cross-examination, further testified as follows:

"That he took the data furnished him by Mr. Wright, and segregated the negatives that corresponded to the data that he had, so far as it lay in

(Testimony of W. Albee.)

his power to accomplish such segregation. It would be impossible for me to say how many negatives were in that room. Neither did I check the number that I segregated. A photographic negative in the commonly accepted sense of the term, is a plate which has been exposed in a photographic camera, and subjected to chemical action to render it sensitive, and to bring out a latent image thereon. Developing is only one of the processes through which it passes to become a negative. A photographic plate might be one of three things. In the broad sense of the term it is any piece of glass which has been sensitized with the chemical emulsions to render it sensitive to light. Photographers, in speaking of negatives, usually class a plate which comes from the stock house as a plate. Roughly speaking, either negative, or in some instances what is technically known as a transparency, is also a plate."

Testimony of Agnes Shortall, for Plaintiff.

AGNES SHORTALL, a witness called by plaintiff, being first duly sworn, was interrogated by A. J. Falknor, attorney for plaintiff, and testified:

"I was employed at the Curtis Studio, but not by Mrs. Curtis. It will be two years on the first of January, coming, when I was employed there, for a year and a half."

Q. I will ask you if they were in possession of any materials [45] or plates, or properties of the North American Indian?

(Testimony of Agnes Shortall.)

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and leading question, and calling for a conclusion of the witness, and furthermore, she has testified that she was not in the employ of Mrs. Curtis, and never was.

The COURT.—The objection is overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Q. Where was the property of the North American Indian located?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and there is no foundation laid that this witness knew that the North American Indian had any property.

The COURT.—The objection is overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. Different places in the studio on exhibit.

Q. State whether or not there was any general place in the studio where the property of the North American Indian was generally segregated from the balance of the studio.

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and leading.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

The witness then testified:

"The Indian negatives were kept separate from the studio negatives. They were kept on the second floor, and in a sort of Indian cabinet. All of

(Testimony of Agnes Shortall.)

the negatives were kept there, and the curios were kept in a cabinet, most of them, and the baskets were arranged around the studio for display purposes. The volumes of the North American Indian and portfolios were kept in the studio.

Q. I will ask you whether there was any common understanding [46] around the studio as to whose property this was.

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. Oh, yes, sir.

Q. What was the common understanding?

A. That all the material belonged to the North American Indian.

Testimony of Lewis Albert, for Plaintiff (Recalled.)

LEWIS ALBERT, being recalled by plaintiff, was interrogated by Mr. Falknor, attorney for plaintiff, and testified as follows:

Q. I asked you to produce us, so that the jury can catch the idea of the exact nature of this work, the eleven volumes that have been published, and the eleven portfolios that have been published. Did you do that?

Mr. BARNES.—I object to that on the ground that it is not in issue in this case. It does not make any difference whether they published one volume,

(Testimony of Lewis Albert.)

or forty, or whether there is to be twenty more, or not.

The COURT.—The conduct of the parties disclosed by this work, the character of the books that went into it, and how they compare with these negatives that are left, and in dispute,—it might tend to show the character of that property. The objection is overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

(No response from the witness.)

Q. Will you show the jury the eleven volumes that have been published by the North American Indian?

Mr. BARNES.—I make the same objection.

A. The volumes are similar to the books here.

Mr. FALKNOR.—We offer in evidence, and we reserve the right [47] to withdraw them, these eleven volumes designated from one to eleven, inclusive, and let the clerk give them some appropriate reference.

The CLERK.—They may be marked Plaintiff's Exhibits 10–A, 10–B, 10–C, 10–D, 10–E, and so on.

Q. Now, the eleven volumes are those that I am showing the jury samples of. How many more are you required to produce to complete your set to the subscribers?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

(Testimony of Lewis Albert.)

The COURT.—Exception allowed.

A. Our contract calls for twenty volumes, and twenty portfolios; that would make nine additional yet to be published.

Q. Accompanying each of these volumes is what you call— A. A portfolio.

Q. Each one of these portfolios accompanies the respective volumes, that is correct, is it?

A. Yes, sir.

Q. Will you show the jury the photographs that are involved in the one, so that they can get an idea of what the character of these is?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Mr. FALKNOR.—Take your time and show the jury the whole business.

Thereupon the witness exhibited to the jury numerous pictures taken from the portfolios, and gave the names of the pictures thus shown. [48]

Q. That is sufficient to give the jury an idea of the character of these photographs and portfolios. You may explain to the jury generally how these respective volumes, and portfolios, relate if they do, to any particular tribe, or group of tribes?

Mr. BARNES.—I object to that as incompetent, immaterial and irrelevant.

The COURT.—The objection is overruled.

A. The general custom, the number of tribes

(Testimony of Lewis Albert.)

treated, depends upon the size of the tribe. In many instances a tribe is treated in one volume and portfolio. The volume containing the checked material, and small illustrations, and the portfolio containing the more important phases of Indian life. In the case of the first volume, it treats with two tribes, the Navajo and the Apache.

Q. What amount of money has been expended in the production of the volumes to date, if you know?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. About $850,000.00.

Q. I will ask you whether or not the plates that are in the possession of the marshal are essential and necessary to the completion of this work

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and calling for a conclusion of the witness. As to these plates being in the possession of the marshal, when they are not.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. They are absolutely essential to the completion of the [49] work. There is considerable material there in the way of negatives that will cover tribes not yet included in any volume.

Q. And could these negatives be reproduced?

(Testimony of Lewis Albert.)

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. In the majority of the instances they positively could not be duplicated.

On cross-examination the witness LEWIS ALBERT, being interrogated by Mr. Barnes, testified:

"I have not employed a man named Lennes to duplicate these negatives. I did employ him to make positives of some of these negatives, and he did make positives of some of them. I do not know whether or not a negative could be made from a positive."

Mr. FALKNOR.—I offer these portfolios in evidence.

Mr. BARNES.—I object to them as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed. The portfolios will be admitted in evidence.

Thereupon the portfolios were admitted in evidence, and marked Plantiff's Exhibits 11–A, 11–B, 11–C, etc.

Testimony of B. S. Patten, for Plaintiff.

B. S. PATTEN, a witness called by the plaintiff, was interrogated by Mr. Falknor, its attorney, and testified as follows:

Q. Were you ever employed by the defendants, or either of them?

To which witness replied that he was, that he was employed at the studio at Fourth and University two years and a half ago. That he remained there two years, ceasing his connection on the 6th day [50] of May, 1920. That he was there at the time the marshal took possession of the property involved in this lawsuit. That prior to that time he had been connected with the studio approximately two years.

Q. I will ask you, Mr. Patten, if in the studio there, the material which the marshal took possession of was generally separated and segregated from the balance of the property in the studio?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and leading.

The COURT.—It is leading, but I do not know of any other way to get at it. The objection is overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. Yes, sir; it was.

Q. Explain to the jury how it was kept there.

A. The Indian negatives were kept in cases by themselves, and the portfolios and books were kept in a case by itself, and the baskets, most of them,

(Testimony of B. S. Patten.)

and the material used in gathering the books, which were there in the studio, were kept in boxes, stored away out of the way, and in a way not used by the studio, with the exception of the few of the better baskets, and souvenirs, or trinkets, that we used for display purposes in the studio.

Q. What was the common understanding around the studio as to whose property it was?

A. The North American Indian.

Q. The plaintiff in this case? A. Yes, sir.

Mr. BARNES.—I want to object to that question as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed. [51]

Q. *Were you* these in possession at any time when a demand was made for the turning over of this property?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and a leading question.

The COURT.—The objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

A. Yes, sir; I was.

Q. Explain to the jury.

A. Mr. Wright came up to the studio, and talked first to Miss Curtis, who was manager of the studio, and she in turn called me, and he made a demand, and wanted to move the North American Indian

(Testimony of B. S. Patten.)

material, negatives, and everything, out of the studio.

Q. Mr. Wright representing the plaintiff.

A. Mr. Wright representing the plaintiff.

Q. That was before the marshal came into possession? A. Yes, sir.

Q. Did you surrender it to him?

A. No, sir, we did not.

Q. But he did demand it? A. Yes, sir.

Q. Now, that property at that time was located here in Seattle, King County, Washington?

A. Yes, sir.

Q. And he demanded the same property that the marshal subsequently came and took?

Mr. BARNES.—I object to that as being incompetent, immaterial, irrelevant, and leading, and no foundation shown that the witness knew.

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed. [52]

A. Yes, sir, he demanded the property of the North American Indian. I will have to qualify that and say that we didn't know positively all the property of the North American Indian.

Q. But the property that was generally understood to be the North American Indian property was the property that he demanded, and the property that the marshal took? A. Yes, sir.

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, and leading.

(Testimony of B. S. Patten.)

The COURT.—It is leading. It is answered, however. The objection is overruled.

The witness then testified that at the time, to the best of his knowledge, Mrs. Curtis was living in the University section in the city of Seattle, King County, State of Washington, and that to his knowledge she had been living there at least a year. That at the time Mr. Wright came down and demanded this property Miss Beth Curtis was in charge of the studio. That she was there at the time the demand was made. That the demand was made on Miss Beth Curtis, who called the witness, and wanted to know what they should do about it.

On cross-examination by Mr. Barnes the witness testified:

That he would say that the demand made by Mr. Wright was made about three or four weeks before the goods were replevined. That he did not know the exact date the goods were replevined, but would say it was in April, and that the demand was made around the latter part of March. That he would not say definitely that the demand was not made after the 6th day of April, 1920. That Mr. Wright came up to the studio, and just what he said was: "I am representing the North American Indian," to Miss Curtis, "And they instructed me to come and get their property." He simply said: "I come up here and want this property, it belongs to the North American Indian." That the witness told Mr. Wright that so far as [53] he was concerned that he could not have the property. That

(Testimony of John G. Barnes.)

part of the conversation took place on the first floor, and part of it on the third floor, of the studio.

Mr. FALKNOR.—For the purpose of showing that a seizure was made in this county, I offer the marshal's return in evidence.

The COURT.—It may be admitted in evidence.

Thereupon the marshal's return was admitted in evidence, and marked Plaintiff's Exhibit 12.

Testimony of John G. Barnes, for Plaintiff.

JOHN G. BARNES, called as a witness on behalf of the plaintiff, being first duly sworn, was interrogated by Mr. Falknor, attorney for plaintiff, and testified as follows:

Q. Is that your signature to that letter (Showing.) A. Yes, it is.

Q. Were you attorney for Mrs. Curtis, one of the defendants, at the time you wrote this letter?

A. Yes, sir; I was.

Mr. FALKNOR.—We offer in evidence the letter written by John G. Barnes, dated April 9, 1920, addressed to the plaintiff.

Mr. BARNES.—I beg your pardon; it is not addressed to the plaintiff.

Mr. FALKNOR.—It is addressed to an officer of the plaintiff then, we will show.

The COURT.—It may be admitted in evidence.

Thereupon the letter referred to was admitted in evidence, and marked Plaintiff's Exhibit 13.

Testimony of W. B. Herr, for Plaintiff.

W. B. HERR, called as a witness on behalf of plaintiff, being first duly sworn, was interrogated by Mr. Falknor, attorney for plaintiff, and testified as follows:

That he was familiar with the signature of J. W. Bryan, an attorney. That he knew that at that time he was representing Mrs. Curtis, that he was her attorney. That the signature to the letter shown him was Mr. Bryan's, attorney for Mrs. Curtis. [54]

Mr. FALKNOR.—We offer this letter in evidence in connection with the other letter, for the purpose of showing that the defendant, Mrs. Curtis, at this time recognized our title to the property, through her attorney.

The COURT.—It may be admitted.

Thereupon the letter referred to was admitted in evidence, and marked Plaintiff's Exhibit 14.

Mr. FALKNOR.—We now offer in evidence a receipt for the last taxes paid to the State of New York, corporate taxes, and license fee, paid on January 9, 1920, together with certificate that the articles of incorporation were filed on the 18th day of December, 1909.

Mr. BARNES.—I object to that as incompetent, immaterial and irrelevant, not proper evidence, and cannot be introduced in evidence on account of not being authenticated in the manner provided by the statutes of the United States.

(Testimony of Edward S. Curtis.)

The COURT.—Objection overruled.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed. It may be admitted.

Thereupon the receipt and certificate referred to, was admitted in evidence and marked Plaintiff's Exhibit 15.

Testimony of Edward S. Curtis, for Plaintiff.

EDWARD S. CURTIS, a witness called on behalf of the plaintiff, being first duly sworn, was interrogated by Mr. Falknor, attorney for plaintiff, and testified as follows:

That he was one of the defendants in this case. That at the time he executed the bill of sale on the 21st day of December, 1909, being Exhibit 1, he was married to Clara J. Curtis, the other defendant, and they were husband and wife.

Q. Where was the property situated at the time you executed that bill of sale referred to, and covered by the bill of sale?

Mr. BARNES.—I object to that as being incompetent, immaterial and irrelevant, not the best evidence, and the bill of sale itself [55] is the best evidence.

The COURT.—Objection overruled. Exception allowed.

A. At that time the material was in the Curtis Studio which was then located in the Downs Block, on Second Avenue, in the City of Seattle, King County, Washington.

(Testimony of Edward S. Curtis.)

The witness further testified: I am now a resident of Seattle, State of Washington. I was a resident of Seattle, King County, Washington, at the time this action was instituted. I am familiar with the property the marshal seized in this action. It is the property of the North American Indian. There are a few exceptions to that.

Q. What are they?

A. A bundle of negatives, about thirty in number, I believe, of different members of the Roosevelt family, and an old broken mimeograph, of practically no value. I am now giving this material from my recollection of some months ago. There was a box containing a fish net, I believe, which is valued a couple of dollars, or such a matter; there was a bundle of burlap there, of perhaps *of perhaps* two or three dollars, and there was a box containing old cancelled checks of no value; there was a box containing some old portrait proofs of no value, and I believe there were four or five negatives of people, not Indians; as far as I recollect, that was about all.

Q. Those are the only exceptions?

A. Only exceptions that I could find.

Q. And all the rest and remainder of the property belongs to the plaintiff? A. It does.

On cross-examination by Mr. Barnes the witness testified that he did not find about one hundred negatives of Mt. Rainier, didn't see any. Didn't particularly look for them. I had no information of any of that sort, so there might be odds and ends

(Testimony of Edward S. Curtis.)

of negatives [56] in all those thousands of negatives that I would not see.

Mr. FALKNOR.—The plaintiff rests.

Mr. BARNES.—I offer in evidence, may it please the Court, sections 35 and 37 of the General Corporation Law of the State of New York, as shown and set forth in Birdseye, Cummings & Gilberts Consolidated Laws of New York, Annotated, and which are found in Volume 3 of that law, and which bear the certificate of Secretary of State of New York that they are published by authority, and that they are the laws of New York.

I will state to the Court that this volume belongs to the library, and it is only by special dispensation that it can be had at all, and I desire to read into the record those two sections.

Mr. FALKNOR.—I object to this as being incompetent, immaterial and irrelevant. This is a corporation, at least *de facto*. They have admitted negotiations with it, and are estopped to deny its existence.

The COURT.—I will let Mr. Barnes make his record. The objection is overruled.

Mr. FALKNOR.—Note an exception.

The COURT.—Exception allowed.

Mr. BARNES.—I will read section 35.

> "Upon the dissolution of any corporation its directors, unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders, or members, and shall

have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses.

"Such trustees shall have authority to sue for and recover the debts and property of the corporation by their name as such trustees and shall jointly and severally be personally liable to its creditors, stockholders, or members, to the extent of its property and effects, that shall come into their hands."

"Section 37. Any domestic corporation, at any time before the expiration thereof, may extend the term of its existence beyond the time specified in its original certificate of incorporation, or by-law, or in any certificate of extension of corporate existence, by the consent of the stockhoders owning two-thirds in amount of its capital stock, or if such a stock corporation, by the consent of two-thirds of its members, which consent shall be given either in writing, or by vote, at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the [57] annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by a vote at a meeting as aforesaid, shall be subscribed and acknowledged by the President or Vice-president, and

by the Secretary, or Assistant Secretary of the corporation; and if a corporation formed, under, or subject to the banking law, shall be filed in the office of the Superintendent of Banks, if an insurance corporation, in the office of the Superintendent of Insurance, and otherwise in the office of the Secretary of State, and shall, by such officer, be duly recorded and indexed in a book specially provided therefor, and a certified copy of such certificate, with the certificate of such officer of such filing and record, or a duplicate original of such certificates, shall be filed and similarly recorded, and indexed, in the office of the Clerk of the County wherein the corporation has its principal place of business, and shall be noted in the margin of the record of the original certificate of such corporation, if any, in such offices, and thereafter the term of the existence of such corporation shall be extended as designated in such certificate.

"The certificate of incorporation of any corporation whose duration is limited by such certificate, or by law, may require that the consent of the stockholders owning a greater percentage than two-thirds of the stock, if a stock corporation, or of more than two-thirds of the members, if a non-stock corporation shall be requisite to effect the extension of corporate existence as authorized by this section."

Mr. BARNES.—I now, may it please the Court, offer in evidence an exemplified copy of the certificate of incorporation of The North American Indian, exemplified under the office seal, and also of the Great Seal of State, of the Secretary of State, of the State of New York, filed and recorded on December 18, 1909.

Mr. FALKNOR.—We object to it as being immaterial.

The COURT.—The objection is overruled.

Mr. FALKNOR.—Note an exception.

The COURT.—Exception allowed. It may be admitted.

Thereupon the paper referred to was admitted in evidence, and marked Defendant's Exhibit "A."

Testimony of Lewis Albert, for Defendant (Recalled).

LEWIS ALBERT, recalled as a witness on behalf of the defendant Clara J. Curtis, was interrogated by Mr. Barnes, her attorney, and testified as follows:

Q. Mr. Albert, on the 18th day of August, 1920, you and Mr. Robert I. Alberts, and Mr. Joseph S. Clements signed and acknowledged Articles of Incorporation of The North American Indian, Inc., did you not? [58] A. Yes, sir.

Q. And you filed those in the Secretary of State office of the State of New York on the 23d day of August, did you not? A. I did not.

Q. You did not? A. No, sir.

(Testimony of Lewis Albert.)

Q. You don't know whether they were filed or not?

A. I know that they were filed. Yes, I believe they were.

Q. In that certificate of incorporation you recited that this "The North American Indian" has ceased to exist in December, 1919, did you not?

Mr. FALKNOR.—We object to that as being immaterial. It is a technical question between the trustees and the plaintiff. What difference does it make?

The COURT.—It is not the best evidence. The objection is sustained.

Mr. BARNES.—No, it is not the best evidence, but this man testified that he was manager of this dead corporation in his examination in chief. At this time I certainly have the right to put him on the stand in rebuttal to that.

The COURT.—You are asking him about something that was in some writing on file. I sustain the objection on the ground that it is not the best evidence.

Mr. BARNES.—Note an exception.

The COURT.—Exception allowed.

Mr. BARNES.—The defense rests.

Mr. FALKNOR.—At this time we move that your Honor direct the jury to return a verdict for the plaintiff in accordance with the demand of the complaint excepting from the verdict the property that Mr. Curtis has indicated as exceptions that don't belong to the plaintiff; and for the sake of

(Testimony of Lewis Albert.)

this motion we waive any question of damages. [59]

The COURT.—Do you want to be heard on that, Mr. Barnes?

Mr. BARNES.—Yes, your Honor.

After argument by Mr. Barnes the Court ordered the jury returned into court, and being all present, the Court said:

The COURT.—Gentlemen of the jury, you are excused until ten o'clock Tuesday morning of next week. Bear in mind the caution I have given you. We will adjourn this trial until Tuesday morning at 10 A. M.

Trial resumed Tuesday morning, November 9, 1920, 10 A. M. Jury absent.

Mr. FALKNOR.—If the Court please we are submitting at this time a petition to add as plaintiffs the existing trustees, Mr. Pegram and Mr. Borglum, one in the State of New York, and the other in the State of Connecticut. We have asked to add, not substitute, because I don't think substitution is necessary. We are asking that these two trustees be associated in this case at this time.

Mr. BARNES.—The only controversy in this case is as to whether or not, the defendant, Edward S. Curtis and Clara J. Curtis were unlawfully in possession of this property which was replevined and they refused to deliver it; in other words, it is found in the allegations of paragraph 3. That is the gist of the case.

The COURT.—What about the necessity of any

demand, since you came in and claimed it?

Mr. BARNES.—I am not claiming to be the owner of this property.

Mr. FALKNOR.—Do you admit that you are not?

Mr. BARNES.—My answer does not say so. Have you found any place in there where we claim to be the owner?

Mr. FALKNOR.—You stated awhile ago—then you are disclaiming any interest in the property?

Mr. BARNES.—I am not disclaiming any interest in the [60] property; I am not disclaiming that; I am saying that this defendant is not claiming to be the owner of this property, and she never did claim to be the owner, but it is upon the plaintiff to prove right of possession.

The COURT.—I am going to allow this petition to add the additional plaintiffs. I will ask Mr. Falknor whether, as a condition of allowing that, in the event that you win the suit, are you willing to forego your costs against Mr. Curtis?

Mr. WRIGHT.—We will do that, if your Honor please.

Mr. BARNES.—I desire on the part of Clara J. Curtis to take an exception to the order of the Court allowing the adding as plaintiffs herein, E. S. Pegram, and Gutson Burglam.

Mr. FALKNOR.—Mr. Barnes, I asked you as an attorney, in the presence of the Court, are there any other trustees other than the two we have named, except Edward S. Curtis?

Mr. BARNES.—No.

The COURT.—My understanding of your statement was to the effect that these men were not trustees.

Mr. BARNES.—No, no, your Honor; that was not it. My statement is that these men are not the only trustees. They say here they are the sole and only.

The COURT.—On your admission that Mr. Curtis is the other one, I will grant the motion to add these additional plaintiffs, on your admission, denying you further time.

Mr. BARNES.—Your Honor, I am not making any admissions in this case.

Mr. WRIGHT.—You are making them all the time.

The COURT.—You are allowed your exceptions that you claimed a moment ago.

Mr. FALKNOR.—We will ask the Court to direct the jury to return a verdict as requested.

The COURT.—I have listened to this argument—[61]

Mr. BARNES.—The defendant Clara J. Curtis, excepts to the ruling of the Court, and to the statement of the Court, that 'upon the admission of counsel.'

The COURT.—What was it? You certainly admitted that all your claim was that you didn't mean to claim that these men named Burglam and Pegram, were not directors, as I understood you to say, that you would be able to prove that they were not directors; that is what you said that you didn't mean by that they were not directors, but that they

were not the only ones, but Mr. Curtis was the other one; that is what you said.

Mr. BARNES.—Will your Honor give attention to me for one second? Here is an allegation that they are the sole and only directors, and trustees of the North American Indian, a corporation, and plaintiff herein. I deny that, and ask for leave to produce proof that that is not a fact.

The COURT.—Yes; but you claim that that is not the fact, that Mr. Curtis is the other one. I am disregarding that, that he having arrayed himself against the corporation, the Court would align him as defendant, and he would not be allowed to take any part as a plaintiff.

Mr. BARNES.—The defendant Clara J. Curtis excepts.

The COURT.—You can have your exception allowed.

At no time did the defendant Clara J. Curtis, or her attorney contend that the additional plaintiffs, as trustees, to wit: E. S. Pegram and Gutson Burglam, were not residents respectively of the State of New York and the State of Connecticut.

Mr. FALKNOR.—We will ask the Court to direct the jury to return a verdict as requested.

The COURT.—Have you prepared your verdict?

Mr. FALKNOR.—Yes, your Honor.

The COURT.—Let me see it.

Mr. WRIGHT.—Prepared it adding the other parties. I have [62] prepared it with the exception of what the testimony shows of property that does not belong to the North American Iudian, and

setting forth the value of that property.

The COURT.—I will put in at the foot of this, "Being instructed by the Court so to do."

The COURT.—Bring in the jury.

Jury returned into court, and all present.

The COURT.—Gentlemen, select a foreman right in the box.

Thereupon the jury selected W. D. Allen as their foreman.

The COURT.—Gentlemen of the jury, the Court has decided this case on the law, but under our form of procedure it is necessary for the Court to require you to return a verdict in conformity to the Court's decision as to the law, and this is the verdict: (Court reads to jury:)

We, the jury in the above-entitled cause, do hereby find that the plaintiffs are the owners of, and entitled to the possession of all the property replevined by the marshal, now located in room 64, Cobb Building, Seattle, Washington, except the following:

No. 1. Mimeograph No value
No. 2. Three printing-frames Value $5.00
No. 3. Small box containing cancelled checks No value
No. 4. One box containing portrait proofs No value
No. 5. One box containing fish-nets Value $2.00
No. 6. One box containing burlap. Value $2.50
No. 7. Twenty-nine large negatives of Roosevelt family.....Unknown value

One small Roosevelt negative
Five negatives of women..
One red pocketbook, about 150 years old.....Unknown value.

Being instructed by the Court so to do.

_____,
Foreman.

Mr. BARNES.—The defendant, Clara J. Curtis, at this time takes a general exception to the ruling of the Court granting the motion of the plaintiffs for the instructed verdict, and to the instruction ordering and directing the jury to return a verdict as given by the Court.

The COURT.—Exception allowed. [63]

Thereupon the foreman of the jury signed the verdict.

The COURT.—Gentlemen, listen to the verdict as it stands recorded.

Thereupon the clerk read the verdict.

The COURT.—Gentlemen, do you say one and all that this is your verdict?

JURORS.—Yes.

Mr. BARNES.—The defendant Clara J. Curtis excepts to the acceptance and objects to the acceptance of this verdict.

The COURT.—The objection will be overruled, and an exception allowed. The verdict will be accepted and filed as your verdict and finding in the case, and you are discharged from further consideration of the case.

Mr. BARNES.—We would like an exception, your Honor.

The COURT.—Exception allowed.

The United States of America,
Western District of Washington,—ss.

I, Edward E. Cushman, one of the Judges of the United States District Court for the Western District of Washington, and the Judge before whom the above-entitled cause was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause, and the same are hereby made a part of the record herein.

That the foregoing bill of exceptions contains all of the evidence, and testimony introduced upon the hearing of said cause, together with all objections and exceptions made and taken to the admission, or exclusion of testimony; that the foregoing is a true bill of exceptions, is correct in every particular, is hereby settled and allowed, and made a part of the record in this cause, [64] and that the exhibits referred to therein are all the exhibits introduced upon the trial of said cause.

Done in open court this 17th day of January, 1921.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

[Indorsed]: Filed in the United States, District Court, Western District of Washington, Northern

Division. Jan. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [65]

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

E. S. PEGRAM and GUTSON BORGLUM,
Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Petition for New Trial.

Comes now the defendant in the above-entitled action, Clara J. Curtis, by John G. Barnes, her attorney, and petitions and moves the Court to vacate, and set aside the verdict in the above-entitled cause rendered by the jury in accordance with the order and direction of the Court, and grant a new trial of said cause, upon the following grounds, to wit:

I.

Irregularity in, and abuse of discretion by, the Court in making and entering in the above-entitled cause on the 9th day of November, 1920, the order: "It is hereby ordered, that E. S. Pegram, a resident of the State of New York, and Gutson Bor-

glum, a resident of the State of Connecticut, being the sole directors of the plaintiff herein, are hereby added as plaintiffs in the above action," by which the defendant, Clara J. Curtis, was prevented from having a fair trial of said cause.

II.

Irregularity in, and abuse of discretion by, the [66] Court in the order and decision of the Court made in the above-entitled cause on the 9th day of November, 1920, granting the motion of the plaintiff, and additional plaintiffs, for, and instructing the jury to, render a verdict in their favor, by which the defendant, Clara J. Curtis, was prevented from having a fair trial of said cause.

III.

Insufficiency of the evidence to justify the verdict rendered under the instruction of the Court. The particulars wherein the evidence is claimed to be insufficient to justify the said verdict are as follows:

1. That the plaintiff in the above-entitled action, The North American Indian, Inc., was at the time of the commencement of said action a corporation organized, or existing, under and by virtue of the laws of the State of New York, or of any other State, or at all.

2. That the principal place of business of the plaintiff, The North American Indian, Inc., was at the time of the commencement of the above-entitled action in New York City, New York, or in any other place, or at all.

3. That the additional plaintiff, E. S. Pegram,

was at the time of the commencement of the above-entitled action, or at any other time, or at all, a citizen, or resident, of the State of New York, or a citizen, or resident, of any other State.

4. That the additional plaintiff, Gutson Borglum, was at the time of the commencement of the above-entitled action, or at any other time, or at all, a citizen, or resident, of the State of Connecticut, or a citizen, or resident, of any other State.

5. That the additional plaintiffs, E. S. Pegram and Gutson Borglum, are the sole, or sole and only, directors, or [67] trustees, of the plaintiff in the above-entitled action, The North American Indian, Inc., or that they, or either of them, are directors, or trustees, of said plaintiff, The North American Indian, Inc., at all.

6. That the matter in controversy in the above-entitled action exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars.

IV.

That the verdict rendered in the above-entitled action is against law in the following particulars:

1. That it does not find that at the time of the commencement of the above-entitled action the plaintiff, The North American Indian, Inc., was a corporation organized and existing under and by virtue of the laws of the State of New York or the laws of any other State, or at all, nor that its principal place of business was in New York City, New York, or elsewhere in the State of New York, or in any other State, or at all.

2. That it does not find that at the time of the

commencement of the above-entitled action or at any other time, or at all, the additional plaintiff, Gutson Borglum, was either a citizen, or resident, of the State of Connecticut, or of any other State.

3. That it does not find that at the time of the commencement of the above-entitled action, or at any other time, or at all, the additional plaintiff, E. S. Pegram, was either a citizen, or resident, of the State of New York, or of any other State.

4. That it does not find that the matter in controversy in the above-entitled action exceeds, exclusive of interest and costs, the sum or value, of Three Thousand Dollars, or any other sum, or value, whatsoever, or at all. [68]

5. That it does not find that the defendants in the above-entitled action, or either of them, were at the time of the commencement of the above-entitled action, either citizens, residents, or inhabitants, of the State of Washington.

6. That it does not find that the defendants in the above-entitled action, or either of them, and particularly the defendant, Clara J. Curtis, were, or was, at the time of the commencement of the above-entitled action, or at all, either wrongfully, or unlawfully, in possession of a large, or any, amount of personal property belonging to the plaintiffs, or that they, or either of them, at said time, or at any time, or at all, denied the right of the possession to the plaintiffs herein, or that the said defendants in the above-entitled action, or either of them, or particularly the defendant, Clara J. Curtis, wrongfully, or unlawfully, or at all, held possession

of any property whatsoever in King County, Washington, or in said District, or in any other place, or at all, notwithstanding the plaintiffs had demanded possession thereof.

7. That it does not find that the defendants in the above-entitled action, or either of them, and particularly the defendant, Clara J. Curtis, ever at any time, or at all, wrongfully, or otherwise, or at all, held possession of the property, or any part of it, mentioned or described in the complaint in the above-entitled action.

V.

Error in law occurring at the trial, and excepted to at the time by the defendant, Clara J. Curtis. The particular error relied upon being as follows:

1. Error in refusing to the attorney for Clara J. Curtis the privilege of examining Plaintiffs' Exhibit 1 after it was offered in evidence, before making his objections to the introduction thereof in evidence, and in denying the objections [69] of said defendant to the introduction in, and allowing said Plaintiff's Exhibit No. 1 to be received in evidence.

2. Error in denying the objections of said defendant, Clara J. Curtis, to the introduction in evidence of each of Plaintiff's Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 10 and 11, and admitting the same, and each of them in evidence.

3. Error in denying the objections of said defendant, Clara J. Curtis, to the introduction in evidence of Plaintiff's Exhibit No. 15, and admitting the same in evidence.

4. Error in denying the objections of said defendant, Clara J. Curtis, to all the testimony of the witness, Wayne Albee.

5. Error in sustaining the objections of plaintiff to questions propounded by defendant, Clara J. Curtis, to the witness Lewis Albert, concerning a certificate of incorporation of The North American Indian, Inc., executed by him in August, 1920, and of the contents thereof, and in refusing to permit said witness to answer the same.

6. Error in making and entering the order adding E. S. Pegram and Gutson Borglum as additional plaintiffs in the above-entitled action.

7. Error in granting a motion of plaintiff therefor, and in instructing the jury to return the verdict returned by it in the above-entitled action.

8. Error in receiving and filing the instructed verdict of the jury made in accordance with the direction of the Court so to do.

The foregoing petition and motion is based upon the files and records of the above-entitled court in the above-entitled cause and upon the proceedings had and taken in the trial thereof held on the 5th and 9th days of the month of November, 1920.

JOHN G. BARNES,
Attorney for Clara J. Curtis. [70]

Service of within motion for new trial and receipt of copy admitted this twelfth day of November, 1920.

WRIGHT & WRIGHT, and
POE & FALKNOR,
Attorneys for Plaintiffs.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 12, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [71]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Order Denying Motion of Defendant Clara J. Curtis for New Trial.

This cause came on duly and regularly for hearing on the 20th day of December, 1920, on the motion of the defendant Clara J. Curtis for a new trial of this action. The plaintiff appeared by Elias Wright, of Wright & Wright, attorneys for plaintiff, and the defendant Clara J. Curtis appeared by John G. Barnes, her attorney. After hearing the argument of the attorney for Clara J. Curtis, defendant, in support of said motion, the Court being fully advised in the premises, it is by the Court

ORDERED, that the motion of the defendant

Clara J. Curtis for a new trial of this action be, and the same is hereby denied.

To which ruling and order of the Court the defendant, Clara J. Curtis, by her said attorney, then and there excepted, and her exception is hereby allowed.

Done in open court this third day of January, 1921.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 3, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [72]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225—LAW.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Notice to Join in Application for Writ of Error.

To the Above-named Defendant, Edward S. Curtis, and to Messrs. Herr, Bayley & Croson, His Attorneys:

You, and each of you, will please take notice, that the defendant above named, Clara J. Curtis, is about to apply to the Judge of the United States District Court for the Western District of Washington, Northern Division, for a writ of error to have the United States Circuit Court of Appeals for the Ninth Circuit, review the orders and judgment of the above-entitled court, in the above-entitled action, and that she hereby demands, requests, and notifies you to join in the application for such writ of error.

Dated at Seattle, Washington, this second day of June, 1921.

JOHN G. BARNES,

Attorney for Clara J. Curtis, Defendant Above Named.

Service, and receipt of a copy of the foregoing notice at the city of Seattle, Washington, this second day of June, 1921, is hereby acknowledged and admitted, and notice hereby given that the defendant Edward S. Curtis refuses to join in the application for a Writ of Error in the above-entitled action.

HERR, BAYLEY & CROSON,

Attorneys for Edward S. Curtis, Defendant Above Named.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 1, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [73]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225—LAW.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

E. S. PEGRAM and GUTSON BORGLUM,
Additional Plaintiffs.

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Petition for Writ of Error.

To the Hon. EDWARD E. CUSHMAN, Judge of the District Court Aforesaid:

Now comes Clara J. Curtis, one of the above-named defendants, by John G. Barnes, her attorney, and respectfully shows that on the 17th day of May, 1920, the Court entered its order denying the motion of said defendant, your petitioner, to quash and annul the writ of replevin issued in this cause on the 19th day of April, 1920, and to quash and annul the execution of said writ of replevin by

the marshal; that on the 9th day of November, 1920, the Court made and entered its order adding E. S. Pegram and Gutson Borglum as plaintiffs in said action; that on the 9th day of November, 1920, the Court instructed the jury, and directed it to return a verdict against your petitioner, and in favor of the plaintiff and additional plaintiffs, and upon said directed verdict a final judgment was entered on the 20th day of December, 1920, against your petitioner, one of said defendants.

Your petitioner feeling herself aggrieved by the said orders, verdict and judgment entered thereon, as aforesaid, herewith petitions the Court for an order allowing her to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States in such case made and provided.

Your petitioner further shows that she has duly served upon the [74] only other defendant in this action, Edward S. Curtis, notice and demand to join in this application for a writ of error, and that said Edward S. Curtis has in writing refused so to do, all of which is on file herein.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and herewith assigned, be allowed, and that an order be made fixing the amount of the security to be given by plaintiff in error, conditioned as the law directs.

JOHN G. BARNES,

Attorney for Clara J. Curtis, Petitioner in Error.

Writ of error granted this 17th day of June, 1921. Bond fixed at the sum of Five Hundred Dollars.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [75]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5225—LAW.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,

E. S. PEGRAM and GUTSON BORGLUM,
Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,
Defendants.

Assignment of Errors.

Now comes Clara J. Curtis in the above-numbered and entitled case, and in connection with her petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred therein, on the trial thereof, and upon which

she relies to reverse the judgment entered herein as appears of record:

I.

That the Court erred in making and entering its order on the 17th day of May, 1920, denying the motion of plaintiff in error to quash and annul the writ of replevin issued in this cause on the 19th day of April, 1920, and to quash and annul the execution of said writ by the marshal, for the reasons that the Court was without jurisdiction, right or authority to issue said writ of replevin, and the marshal was without right or authority in executing the same, such a writ being unknown, and unprovided for, under the laws of the State of Washington.

II.

The Court erred in denying the objection of the plaintiff in error to the admission in evidence of Plaintiff's Exhibit 15, and in admitting said exhibit in evidence. The full substance of Plaintiff's Exhibit 15 is that it consists of (1) A purported notice of assessment [76] and receipt from the state tax department, Albany, New York, dated the 18th day of November, 1919, notifying North American Indian, Inc., 437 5th Ave., New York City, that there had been assessed against it an estate franchise tax for period ending October 31, 1920, one mill on cap. stk., amounting to the sum of $110.00 due and payable on or before January first, 1920, stamped: "Jan. 9–20 Received payment. Eugene M. Travis, Comptroller," and (2) A certificate of the Secretary of State of the State of New York, under the office seal, certifying that the certificate of incor-

poration of the North American Indian, with acknowledgment thereto annexed, was filed and recorded in his office on the 18th day of December, 1909.

III.

The Court erred in granting the petition of E. S. Pegram and Gutson Borglum that they be added as plaintiffs in the action; and in making and entering its order adding said E. S. Pegram and Gutson Borglum as plaintiffs in the action, for the reasons:

1. Said petition was filed, and said order made, after both the plaintiff in the action, and plaintiff in error, had each closed its, and her, case to the jury, and after the plaintiff in the case had moved the Court to "direct the jury to return a verdict for the plaintiff in accordance with the demand of the complaint, excepting from the verdict the property that Mr. Curtis has indicated as exceptions that don't belong to the plaintiff."

IV.

That the Court erred in granting the motion of plaintiff, and additional plaintiffs, "to direct the jury to return a verdict as requested," and in directing the jury to return the verdict which the Court instructed it to return, and which, in accordance with such instruction, it did return in the case, for the reasons:

1. No amendment of the complaint in the action was sought, granted or made, after the entry of the order adding the additional plaintiffs. [77]

2. No reopening of the case was sought, granted or had by the plaintiff, or additional plaintiffs, or

either of them, and said verdict was instructed to be returned solely upon the evidence introduced by plaintiff, and plaintiff in error, and after each of them had closed their case to the jury.

V.

That the Court erred in instructing the jury to render, and in receiving and accepting the verdict returned by the jury in accordance with such instruction and direction; and the verdict so directed, returned and received, is against law and the evidence in the case is insufficient to justify said verdict, for the following reasons:

1. No evidence whatsoever was offered, or introduced in the case as to the citizenship of either of the additional plaintiffs E. S. Pegram, or Gutson Borglum.

2. No evidence whatsoever was offered or introduced in the case that either of said additional plaintiffs had any right, title, or interest of any kind whatsoever, or right to possession, of any property whatsoever, or at all, either that mentioned in the complaint, or in that "replevined by the marshal, now located in room 64 Cobb Building, Seattle, Washington," as in the verdict.

3. Said verdict does not find the jurisdiction fact put in issue by the complaint and answer of the plaintiff in error thereto, that at the time of the commencement of the action the plaintiff in the case was a corporation existing under and by virtue of the laws of the State of New York, or that it had any existence whatsoever, or at all, whereas, the evidence introduced by the plaintiff in error was

conclusive, undisputed and admitted, that by reason of the expiration of the time limit fixed in its certificate of incorporation for the duration of its existence, the plaintiff corporation in the case had ceased to exist on the 18th day of December, 1919,—four months before the action was commenced. [78]

4. That said verdict is wholly insufficient to support any judgment whatsoever, and is fatally defective, in that it does not refer to, nor describe, the property, or any of it, mentioned, referred to, or set out in the complaint in the action.

5. That said verdict is wholly insufficient, and is fatally defective in that it does not determine either the ownership of, or right to possession of, all, or any part, of the property referred to, or set out in the complaint, and as to which issue was joined by the answer thereto of plaintiff in error.

6. That said verdict is fatally defective, and wholly insufficient to support any judgment whatsoever in that it does not determine the gist of the action issue made by the complaint and each of the answers of plaintiff in error and defendant Edward S. Curtis, of the alleged wrongful and unlawful detention by plaintiff in error, or defendant Edward S. Curtis, or either of them, of the property referred to, or set out, in the complaint, or of any property whatsoever, or at all.

7. That said verdict is fatally defective, and wholly insufficient to support any judgment in that it does not determine the issue raised by the complaint and the answer thereto of plaintiff in error, of the possession by plaintiff in error at any time,

or at all, of any of the property referred to, or set out, in the complaint.

8. That said verdict is wholly insufficient and fatally defective in that it does not find the value of the property referred to, or set out, in the complaint, or of the property referred to in said verdict, or of any other property save only certain other property which said verdict finds the plaintiffs are not the owners, nor entitled to the possession, and which property is not referred to, described nor set out in the complaint.

VI.

The Court erred in taking from the jury the right to pass upon the following jurisdictional issues of fact, raised by the complaint [79] and the answer thereto of plaintiff in error, and by the answer of defendant Edward S. Curtis.

1. The issue of fact as to whether or not the plaintiff, The North American Indian, Inc., was at the time of the commencement of the action a corporation organized and existing under and by virtue of the laws of the State of New York. Plaintiff in error introduced in evidence Defendant's Exhibit "A," which is an exemplified certified copy of the certificate of incorporation of The North American Indian, certified to be such by the Secretary of State of the State of New York, under the office, and great seal of the State of New York, which shows that the certificate of incorporation of said corporation was filed in the office of the Secretary of State of the State of New York on the 18th day of December, 1909; that it is provided in such certificate of in-

corporation that the duration of the existence of said corporation shall be ten years. Plaintiff in error also introduced in evidence two sections of the laws of the State of New York, one providing the manner in which the term of the existence of a corporation could be extended beyond the time specified in its original certificate of incorporation, and the other providing that upon the dissolution of a corporation its directors at the time of such dissolution shall be the trustees of its creditors and stockholders, with full power to settle its affairs, with authority, by their name as such trustees, to sue for and recover the debts and property of the dissolved corporation. No evidence whatsoever was offered by plaintiff in the case in rebuttal of the evidence so introduced by plaintiff in error.

2. The value of the property referred to, or set out, in the complaint. Upon this issue there was no evidence whatsoever.

VII.

The Court erred in denying the motion of the plaintiff in error for a new trial upon the grounds:

1. Insufficiency of the evidence to justify the verdict rendered [80] under the instructions of the court;

2. That the verdict is against law.

3. Error in law occurring at the trial, and excepted to at the time by the plaintiff in error, the particular errors relied upon being as follows: (10) Error in denying the objections of plaintiff in error to the introduction in evidence of each of plaintiff's exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8,

9, 10 and 11, and in admitting the same, and each of them, in evidence. (2) Error in denying the objections of plaintiff in error to all of the testimony of the witness Wayne Albee.

VIII.

The Court erred in making and entering the judgment made and entered in the case:

1. Because there is no verdict sufficient in law to support said judgment, or any judgment;

2. Because said judgment does not conform to the verdict in the case in that it is therein adjudged "that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the plaintiff," whereas the verdict is "that the plaintiffs are the owners of, and entitled to the possession of all the property replevined by the marshal."

3. Because the verdict did not find, and the court was without jurisdiction to adjudge that plaintiffs return to the Curtis Studio the property described in the judgment as not belonging to plaintiffs, or that in the event of their failure so to do, they pay the defendants the sum of Nine and 50/100 Dollars, the value of said property.

WHEREFORE, plaintiff in error prays that the judgment of said court be reversed, etc.

JOHN G. BARNES,

Attorney for Clara J. Curtis, Plaintiff in Error.

[81]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division Jun. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [82]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5225—LAW.

THE NORTH AMERICAN INDIAN, INC.,
Plaintiff,
E. S. PEGRAM and GUSTON BORGLUM,
Additional Plaintiffs,
vs.
EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO.
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Clara J. Curtis, plaintiff in error, as principal, and Fidelity & Deposit Company, of Maryland, a corporation, as surety, are held and firmly bound unto The North American Indian, Inc., and E. S. Pegram and Guston Borglum, in the full and just sum of Five Hundred Dollars, to be paid to the said The North American Indian, Inc., E. S. Pegram and Gutson Borglum, its and their attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators jointly and severally by these presents.

Signed and dated this the 17th day of June, A. D. 1921.

Whereas, lately at a regular term of the District Court of the United States for the Western District of Washington, Northern Division, sitting at the City of Seattle, in said District, in a suit pending in said court between The North American Indian, Inc., as plaintiff, and E. S. Pegram and Gutson Borglum as additional plaintiffs, and Edward S. Curtis and Clara J. Curtis, formerly husband and wife, and Curtis Studio, as defendants, cause No. 5225 on the Law Docket of said court, final judgment was rendered against the said defendants that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the plaintiff and seized by the marshal and now located in Room 64 Cobb Building, in Seattle, King County, Washington, except [83] certain property in said judgment described, and the said Clara J. Curtis, one of said defendants, has obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said Court in the aforesaid suit; and a citation directed to the said The North American Indian, Inc., E. S. Pegram and Gutson Borglum, citing it and them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days from the date hereof.

Now, the condition of the above obligation is such that if the said Clara J. Curtis shall prosecute her

writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

CLARA J. CURTIS.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
[Corporate Seal] By J. A. CATHCART,
Atty. in Fact.

The foregoing bond approved this the 17th day of June, 1921.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [84]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5225.

CLARA J. CURTIS,
Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., E. S. PEGRAM and GUTSON BORGLUM,
Defendants in Error.

Praecipe for Transcript of Record.

To Hon. F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington:

Please prepare and return a transcript of the following papers and records in cause No. 5225 with the writ of error in the above-entitled cause:

1. The complaint.
2. The summons and return.
3. The answers of each of the defendants.
4. The amended reply of plaintiff.
5. The affidavit for writ of replevin.
6. The bond for writ of replevin.
7. The order for the writ of replevin to issue.
8. The writ of replevin, and return.
9. Motion of defendant Clara J. Curtis to quash writ of replevin.
10. Order denying motion to quash, and exception.
11. Impanelling jury.
12. Petition of E. S. Pegram and Gutson Borglum to be added as plaintiffs.
13. Order making E. S. Pegram and Gutson Borglum additional plffs.
14. Verdict.
15. Judgment.
16. Bill of exceptions.

16½. Motion for new trial and order denying.

17. Notice to Edward S. Curtis to join in application for writ of error, and refusal.

18. Petition for writ of error, order allowing, fixing bond, etc.
19. Assignment of errors.
20. Bond and approval.
21. Order to send up exhibits.
22. Praecipe.

JOHN G. BARNES,
Attorney for Clara J. Curtis, Plaintiff in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 23, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [85]

United States District Court, Western District of Washington, Northern Division.

No. 5225.

CLARA J. CURTIS,
Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., E. S. PEGRAM and GUTSON BORGLUM,
Defendants in Error.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 85, inclusive, to be a full, true, correct and complete

copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges, incurred and paid in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return 215 folios at 15c. $32.25

Certificate of Clerk to transcript of record, 4 folios at 15c. 60

Seal to said certificate 20

[86]

I hereby certify that the above cost for preparing and certifying record amounting to $33.05, has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error, original citation, and orignal order for the sendng up of exhibits issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 12th day of July, A. D. 1921.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [87]

In the United States Circuit Court of Appeals for the Ninth Circuit.

#5225.

CLARA J. CURTIS,
Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., E. S. PEGRAM and GUTSON BORGLUM,
Defendants in Error.

Writ of Error.

United States of America,—ss.
The President of the United States, to the Hon. Judge of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Clara J. Curtis, plaintiff in error, and The North American Indian, Inc., E. S. Pegram and Gutson Borglum, defendants in error, a manifest error has

happened to the damage of Clara J. Curtis, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done. [88]

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, this the seventeenth day of June, A. D. 1921.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington.

Allowed this the 17th day of June, A. D. 1921.

EDWARD E. CUSHMAN,
United States Judge.

Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [89]

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., E. S. PEGRAM and Guston Borglum,

Defendants in Error.

Citation on Writ of Error.

United States of America to The North American Indian, Inc., E. S. Pegram and Gutson Borglum, Defendants in Error, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein Clara J. Curtis is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Clara J. Curtis, plantiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court

of Western Washington, this seventeenth day of June, A. D. 1921.

[Seal] EDWARD E. CUSHMAN,
Judge of the United States District Court for the District of Western Washington.

Receipt of a copy, and service of the foregoing citation this seventeenth day of June, A. D. 1921, is hereby admitted and acknowledged.

WRIGHT & WRIGHT,
POE & FALKNOR,
Attorneys for The North American Indian, Inc., E. S. Pegram and Gutson Borglum, Defendants in Error. [90]

Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLARA J. CURTIS,
Plaintiff in Error,
vs.
THE NORTH AMERICAN INDIAN, INC., E. S. PEGRAM and GUTSON BORGLUM,
Defendants in Error.

Order Re Transmission of Original Exhibits.

Now, upon this 8th day of July, 1921, upon motion of John G. Barnes, attorney for Clara J. Curtis, plaintiff in error, sufficient cause appearing there-

for, and the Court deeming it necessary and proper that such be done, it is

ORDERED that the plaintiff's original Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, and defendant Clara J. Curtis's original Exhibit "A," filed and introduced as evidence on the trial of this cause, be by the clerk of the United States District Court for the Western District of Washington, forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of the record on appeal, in the cause, and that after the final disposition of the cause in said court said original exhibits be returned to the said clerk of the District Court.

Done in open court this 8th day of July, 1921.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington. [91]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 8, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3716. United States Circuit Court of Appeals for the Ninth Circuit. Clara J. Curtis, Plaintiff in Error, vs. The North American Indian, Inc., a Corporation, E. S. Pegram and Gutson Borglum, Defendants in Error. Transcript of Record. Upon Writ of Error to the United

States District Court of the Western District of Washington, Northern Division.

Filed July 15, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3716.

CLARA J. CURTIS,
Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., E. S. PEGRAM and GUTSON BORGLUM,
Defendant in Error.

Designation by Plaintiff in Error of Exhibits to be Printed.

Comes now the plaintiff in error in the above-entitled action, by John G. Barnes, her attorney, and makes the following statement of the errors on which plaintiff in error intends to rely, and of the parts of the record in said cause which she thinks necessary for the consideration thereof, as follows:

The errors upon which plaintiff in error intends to rely are:

1. Denial of the motion of plaintiff in error to

quash the writ of replevin, and its execution by the marshal.

2. Denying objection of plaintiff in error to the admission in evidence, and in admitting in evidence, Plaintiff's Exhibit 15.

3. In granting the petition of E. S. Pegram and Gutson Borglum that they be added as plaintiffs in the action, and in entering an order adding them as plaintiffs therein.

4. In granting the motion of defendants in error for a directed verdict of the jury, in directing the jury to return the verdict returned by it, and in accepting and receiving said verdict.

5. In taking from the jury the right to pass upon the jurisdictional issues of fact raised by the complaint and answer of plaintiff in error.

6. In denying the motion of plaintiff in error for a new trial.

7. In rendering and entering the judgment made and entered in the cause.

The parts of the record in said cause which plaintiff in error thinks necessary for the consideration of said foregoing errors relied upon by her are the following:

1. The transcript of the record prepared by the Clerk of the District Court, which includes Plaintiff's Exhibit 12.

2. Original Exhibits: Plaintiff's Exhibits Nos. 13, 14 and 15, and Defendant's Exhibit "A."

JOHN G. BARNES,
Attorney for Plaintiff in Error.

Receipt of copy and service of foregoing state-

ment and designation this 27th day of July, 1921, is hereby admitted.

WRIGHT & WRIGHT,
POE & FALKNOR,
Attorneys for Defendants in Error.

[Endorsed]: No. 3716. United States Circuit Court of Appeals for the Ninth Circuit. Clara J. Curtis, Plaintiff in Error, vs. North American Indian, Inc., et al., Defendants in Error. Designation of Plaintiff in Error under Rule 23. Filed July 29, 1921. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 13.

Nos. 5225, 5328. Plffs. Ex. #13.

JOHN G. BARNES
Attorney-at-law
1017 White Bldg.
Seattle, Washington

April 9, 1920.

Mr. Edward S. Pegram,
23 Wall Street,
New York City, N. Y.

Dear Sir:

Early last July James W. Bryan called on you, as the attorney for Mrs. Clara J. Curtis, the wife of Edward S. Curtis, in the divorce suit of Mrs. Curtis against Mr. Curtis.

He explained to you that in the divorce decree Mrs. Curtis had been awarded the Curtis Studio in Seattle, including whatever right Mr. Curtis had in the negatives, or right to take prints therefrom, belonging to The North American Indian, Inc., and

that Mr. Curtis had been enjoined from removing any negatives, or prints, or other property whatever, from the Curtis Studio.

From that part of the decree disposing of the property Mr. Curtis appealed to the Supreme Court, which court has just handed down a decision affirming the decree. The lower court which tried the case, would not permit Mr. Curtis to supersede the injunction against removing any of the property from the studio, or to appeal therefrom.

Mr. Bryan, who on account of his political activities requiring his absence from Seattle, is no longer the attorney for Mrs. Curtis, and she has employed me to handle her affairs.

Mr. Bryan wrote Mrs. Curtis that you told him you would get from Mr. Curtis an inventory of just what belonged to The North American Indian, Inc., that was in the Curtis Studio in Seattle, and would either give, or allow, her to make a copy thereof.

Would you be kind enough to advise me how far you have progressed in that matter. Mrs. Curtis expects to be able to take possession of the Curtis Studio in about thirty days and would, of course, like to know what belongs to her and what belongs to the North American Indian, Inc.

As I have heretofore said, Mrs. Curtis was awarded whatever right of possession, taking prints therefrom, etc., which Mr. Curtis had in the negatives belonging to The North American Indian, Inc. She would very much like to enter into a definite agreement with the North American Indian Inc.,

Mr. Edward S. Pegram 2 Apr. 9,1920.
as to the rights, and I can assure you that she will faithfully keep her part of that agreement and not follow in the footsteps of her former husband.

Hoping to hear from you soon, I remain,

Very truly yours,
JOHN G. BARNES.

[Endorsed]: No. 3716. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 15, 1921. F. D. Monckton, Clerk. Plffs. 13.

Plaintiff's Exhibit No. 14.

5225, 5328. Plff. Ex. No. 14.

Telephone—Vanderbilt 6000
THE COMMODORE
Forty-Second Street and Lexington Avenue
Grand Central Terminal
Pershing Square
New York

John McE. Bowman
President,
George W. Sweeney
Vice Pres. & Mgr.

July 17, 1919.

Mr. Edward S. Pegram,
23 Wall Street,
New York City.

Dear Sir:

Confirming my statements to you today and in order to make a sort of record of my suggestions for

our mutual convenience, you will please permit me to say concerning the case of the North American Indian and the Curtis Studio that Mrs. Curtis has been awarded by the Court all the rights of her husband, Edward S. Curtis, in the Curtis Studio and all of the rights of her said husband in the printing and selling of any kind of photographic productions or Indian Prints at the City of Seattle.

The question arises as to what portion of the equipment and other things at Seattle now incorporated in the Curtis studio in fact belongs to the Curtis's and what portion belongs to the North American Indian. Of course the Court cannot award to Mrs. Curtis anything that belongs to your corporation.

As I understood our agreement it was that you would write to Mr. Curtis and obtain from him a definite itemized statement of everything that there is now at Seattle which in fact belongs to the North American Indian, and having obtained same, that you will send me a copy of it. This statement I shall be very glad to get and its contents may satisfy the necessary demand for information along that line. It would be a round-about way for us to obtain this information through the Court. It would be more troublesome to do it that way. It is only fair, from another standpoint, that we should know what portion of the equipment or what things there are at Seattle that your company claims in view of the fact that the Court has awarded the Studio to Mrs. Curtis. In this connection I desire to state that the judgment awarding Mrs. Curtis

the Studio has been appealed by Mr. Curtis, and is now pending for final decision in the Supreme Court of Washington.

2—

There was this further proposition discussed by us this morning, concerning which I desire your leave for me to present in this manner my view of. We feel that whatever property the North American Indian may have at Seattle which may legitimately be used as a part of the Curtis Studio, or in its operation, that Mrs. Curtis should be given such privileges by a mutually satisfactory agreement with the North American Indian, as are now enjoyed by Mr. Curtis.

We understand there are negatives which pertain to Indian lore but which are not part of the publication known as The North American Indian, and which Mr. Curtis has full right to make use of. Now, whether these are owned by The North American Indian, or by Mr. Curtis, we want to have the use of them at the Studio. Mrs. Curtis can accept and give bonded guarantee for the preservation of any stock, negatives, or property of any kind, and she can also give bonded guarantee to comply with any contract that she may make, either as to the faithful care of the property or as to the payment of royalties, or otherwise.

Finally, I desire to bespeak your courteous consideration of Mrs. Curtis. She has borne the brunt of the work of establishing this Curtis Studio, and has looked out for the business while Mr. Curtis was abroad. We think you ought to accept the findings

and conclusions, and decree of the Court as evidence of her merit and of her absolute right to first consideration in this matter. Then you know Mr. Curtis and you are bound to agree that there is no hope for Mrs. Curtis being cared for and for the minor child being looked after, except through enforcement of the Court's decree. That is to say, Mr. Curtis' promises are entirely futile and cannot be relied upon.

Thanking you very *m*indly for your courtesies, I remain

Very truly yours,
J. W. BRYAN.

Address:
Washington, D. C.,
c/o Senator Miles Poindexter—till Sept. 1, 1919.
2501 Westview Drive, Seattle,Wash., after Sept. 1, 1919.

[Endorsed]: No. 3716. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 15, 1921. F. D. Monckton, Clerk. Plffs. 14.

Plaintiff's Exhibit No. 15.

5225. Plff. Ex. 15. Adm. Nov. 5.
Form 1–11.

NOTICE OF ASSESSMENT AND RECEIPT

STATE TAX DEPARTMENT, ALBANY, N. Y.

Date 11/18/19.

NOTICE is hereby given that there has been assessed against you the amount set opposite as a franchise tax under Art. 9–A of the tax law.

It is due and payable on or before JANUARY 1, 1920.

CERTIFIED CHECKS should be payable and forwarded to STATE COMPTROLLER Albany, N. Y., with this form.

North American Indian, Inc.
437 Fifth Ave.,
N. Y. City.

STATE FRANCHISE TAX
On Business Corporations
For Period Ending October 31, 1920

TAXES, PENALTIES, ETC.

Tax on income at 4½% $110.00
One mill on cap. stk.....
Minimum tax
Penalty
Interest Jan. 9–1920
Total, ...

Received payment,
EUGENE M. TRAVIS,
Comptroller.

_____,
Assistant Deputy Comptroller.

This notice must be returned at the time payment is tendered, as when properly signed it becomes a receipt for taxes. (OVER)

If the amount of the annual net income as returned to the United States Treasury Department is changed or corrected by the Commissioner of Internal Revenue or other officer, a return of such changed or corrected net income, under oath or

affirmation, shall be made to the State Tax Commission, Albany, N. Y., within ten days thereafter.

[Stamped]: Received Jan. 2, 1920. Comptroller's Office, State of New York.

State of New York,
Office of the Secretary of State,—ss.

IT IS HEREBY CERTIFIED, That the Certificate of Incorporation of

The North American Indian,

with acknowledgment thereto annexed, was filed and recorded in this office on the 18th day of December, 1909.

WITNESS my hand and the seal of office of the Secretary of State at the City of Albany, this fourth day of October, one thousand nine hundred and twenty.

[Seal] C. W. TAFT,
Second Deputy Secretary of State.

[Endorsed]: No. 3716. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 15, 1921. F. D. Monckton, Clerk. Plffs. 15.

Defendant's Exhibit "A."

5225. Defts. Ex. "A." Adm. Nov. 5. 4261

UNITED STATES OF AMERICA
STATE OF NEW YORK
By
FRANCIS M. HUGO
Secretary of State and Custodian of the Great Seal Thereof.

IT IS HEREBY CERTIFIED, That CHARLES W. TAFT was, on the day of the date of the annexed Certificate and Attestation, Second Deputy Secretary of State of the State of New York, and duly authorized by the laws of said State to make such Attestation and Certificate and to perform the duties belonging to the Secretary of State in making such Attestation and Certificate, in like manner as said Secretary of State; that the said Certificate and Attestation are in due form and executed by the proper officer; that the seal affixed to said Certificate and Attestation is the seal of office of the Secretary of State of the State of New York; that the signature thereto of the said Second Deputy Secretary of State is in his own proper handwriting and is genuine; and that full faith and credit may and ought to be given to his acts; and, further, that the Secretary of State is the Custodian of the original certificate of incorporation so certified and

attested and Custodian of the Great Seal of said State, hereunto affixed.

IN TESTIMONY WHEREOF, The [Seal] Great Seal of the State is hereunto affixed.

WITNESS my hand at the City of Albany, the nineteenth day of October, in the year of our Lord one thousand nine hundred and twenty.

FRANCIS M. HUGO,
Secretary of State.

THE NORTH AMERICAN INDIAN.

CERTIFICATE OF INCORPORATION.

We, the undersigned, all being persons of full age and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

FIRST.—The name of the proposed corporation is The North American Indian.

SECOND.—The purposes for which it is to be formed, are to prepare for publication, print, electrotype, bind, sell and distribute the publication known as "The North American Indian," heretofore conducted and now being conducted by Edward S. Curtis.

To apply for, purchase or otherwise acquire and to sell, either as principal or agent and as freely

as natural persons might or could do, the said publication and any allied or incidental publications.

To acquire, own, deal in and deal with all materials and articles of any kind or description used or useful in connection with any or all of the purposes and objects hereinbefore expressed.

To acquire and take over as a going concern and to carry on the business of the said Edward S. Curtis in connection with the said publication and in furtherance thereof and in connection therewith to acquire the good will and all or any part of the assets and to assume or otherwise provide for all or any of the liabilities of the owner of such business in connection therewith.

To manufacture, purchase or otherwise acquire and to sell and deal in all kinds of materials, goods, wares, and merchandise which may be required for any of the purposes of the company's business, or which may seem capable of being profitably used or dealt in in connection with such business.

Subject to the restrictions or limitations imposed by law to purchase or otherwise acquire, hold, own, sell, assign, transfer, mortgage, pledge, exchange or otherwise dispose of the shares of the capital stock, bonds, obligations or other securities or evidences of indebtedness of other corporations, domestic or foreign, and the good will, rights, assets and property of any and every kind or any part thereof, of any person, firm or corporation, domestic or foreign, and if desirable to issue in exchange therefor the stock, bonds or other obligations of this company, and while the owner of such shares of the

capital stock to exercise all rights, powers and privileges of ownership, including the power to vote thereon; and for any and all lawful purposes, in the course of the transaction of the business and affairs of the corporation, to acquire real and personal property, rights and interests of every nature, and to execute and issue bonds, debentures and other negotiable or transferable instruments, and to mortgage or pledge any or all other property of the corporation; to secure such bonds, debentures or other instruments, upon such terms and conditions as may be set forth in the instrument or instruments mortgaging or pledging the same, or in any deed, contract or other instrument relating thereto.

To purchase or otherwise acquire real and personal property of any and all kinds that may be lawfully acquired and held by a business corporation, and in particular lands, leaseholds, shares of stock, mortgages, bonds, debentures and other securities, merchandise, book debts and claims, copyrights, manuscripts, trademarks trade names, brands, labels, patents and patent rights, licenses, grants and concessions and any interest in real or personal property.

To make, accept, endorse, execute and issue promissory notes, bills of exchange, bonds, debentures and other obligations, from time to time, for the purchase of property or for any purpose in or about the business of the company, and to secure the payment of any such obligation by mortgage, pledge, deed of trust, or otherwise.

To sell, improve, manage, develop, lease, mortgage, dispose of or otherwise turn to account, deal in or deal with all or any part of the property of the company.

To do all and everything necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or associated with other corporations, firms or individuals, and to do any other acts, thing or things incidental or pertaining to, or grow ing out of, or connected with the aforesaid business, or powers, or any part or parts thereof, provided the same be not inconsistent with the law under which this corporation is organized.

The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth; and it may conduct such business in all its branches or any part thereof outside of the State of New York, and in other States and Territories and dependencies of the United States and in foreign countries.

THIRD.—The amount of the capital stock is one hundred and fifty thousand dollars ($150,000), of which the sum of one hundred thousand dollars ($100,000) shall be preferred stock and the sum of fifty thousand dollars ($50,000) shall be common stock.

The said one hundred thousand dollars ($100,000) of preferred stock shall be entitled to receive dividends at the rate of six per cent. per annum, payable semi-annually, on the first days of November

and May in each year, or such other dates as may be determined by the board of directors, out of the earnings of said company, in preference and priority to any dividends upon the common stock, and such dividends shall be cumulative, so that any deficiency in the dividends to be paid on said preferred stock shall be made good out of the earnings of subsequent years before any dividends shall be paid upon the common stock. Such preferred stock shall not, however, be entitled to participate in any other or additional earnings or profits, but shall be entitled to be repaid in full upon any distribution of the assets of the corporation in the event of insolvency or dissolution, before any distribution of capital shall be made to the common stock.

The company shall have the option of redeeming the preferred stock, in whole or in part, at any time and from time to time, at the par value thereof, in addition to dividends accumulated, earned or accrued thereon. Such redemption shall be effected by payment out of the surplus fund, if any, of the company. Such redemption of preferred stock may be made at any time by the board of directors upon request of the holder of the preferred stock, if there shall be sufficient surplus profits to warrant such redemption, or it may be made at any time, upon the election of the board of directors by giving thirty days' notice to the holder of the preferred stock selected for redemption, of the time when the same will be so redeemed.

Neither the amount of the preferred stock nor the amount of the common stock shall be increased nor shall more than sixty thousand dollars ($60,000) of

preferred stock be issued except with the express assent of the holders of a majority of the preferred stock and the holders of a majority of the common stock outstanding at the date of the consent to any such increase.

FOURTH.—The number of shares of which the the capital stock shall consist is one thousand five hundred shares (1500), each of the par value of one hundred dollars ($100), being one thousand (1000) shares of preferred stock and five hundred (500) shares of common stock, the preferred stock and common stock being of the same denomination, and the amount of capital with which said corporation will begin business is one thousand dollars ($1,000).

FIFTH.—The principal business office of the corporation is to be located in the Town of Ramapo (Sterlington Post Office), Rockland County, State of New York.

SIXTH.—Its duration is to be ten years.

SEVENTH.—The number of its directors is to be three and pursuant to law it is hereby provided that directors are not required to be stockholders.

EIGHTH.—The names and postoffice addresses of the directors for the first year are as follows:

Names.	Postoffice Addresses.
Edward S. Curtis,	Seattle, Washington.
Robert C. Morris,	City of New York, New York (135 Broadway, Borough of Manhattan).
F. Gordon Brown,	City of New York, New York (23 Wall Street, Borough of Manhattan).

NINTH.—The postoffice addresses of the subscribers to this certificate and a statement of the number of shares of stock—all being preferred stock—which each is to take in the corporation are as follows:

Names.	Postoffice Addresses.	Number of Shares of Preferred Stock.
Edward S. Curtis,	Seattle, Washington.	4
Robert C. Morris,	City of New York, New York (135 Broadway, Borough of Manhattan).	3
F. Gordon Brown,	City of New York, New York (23 Wall Street, Borough of Manhattan)	3

TENTH.—The board of directors may appoint an executive committee of one, which committee shall be known by the designation General Manager. Whenever the board of directors are not in session such General Manager shall have and may exercise any and all powers of the board of directors in the management of the business operations of the corporation which may be lawfully delegated. The said committee shall continue during the pleasure of a majority of the board of directors. The power of said committee shall not be construed to extend to the declaration of dividends, to the sale, leasing, or encumbering of the real property of the corporation, or to the purchase or retirement of preferred

stock; the powers to be exercised by said committee to be confined to the carrying on of the usual and ordinary business operations of the company.

Inasmuch as the principal business of the corporation will involve and depend upon the personal services of Edward S. Curtis, it is expressly declared and provided that from time to time contracts with the said Edward S. Curtis may be made by the board of directors notwithstanding he shall be a member of such board and be present at and participate in its transactions concerning such contracts, and notwithstanding the directorship of the said Edward S. Curtis and of his participation in such contract and in the transactions relating thereto, the same, if otherwise valid, shall be enforceable according to the terms thereof.

The meetings of the board of directors may be held at any place within or without the State of New York.

IN WITNESS WHEREOF, We have made, signed and acknowledged this certificate in duplicate, this 16th day of December, 1909.

EDWARD S. CURTIS.
ROBERT C. MORRIS.
F. GORDON BROWN.

In presence of
WM. H. BRUDER.

State of New York,
County of New York,—ss.

On this 16th day of December, 1909, before me personally appeared Edward S. Curtis, Robert C.

Morris and F. Gordon Brown, to me personally known and known to me to be the persons described in and who made and signed the foregoing certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

[Seal] WM. H. BRUDER,
Notary Public,
New York County.

[Endorsed]: Dated: December 16, 1909. The North American Indian. Certificate of Incorporation. Tax for privilege of organization of this Corporation—$75—Under Section 180, Chapter 62, Laws of 1909. Paid to State Treasurer before Filing. State of New York. Office of Secretary of State. Filed and Recorded Dec. 18, 1909. Samuel S. Koenig, Secretary of State.

State of New York, 46271
Office of the Secretary of State,—ss.

I have compared the preceding with the original Certificate of Incorporation of

The North American Indian,

filed and recorded in this office on the 18th day of December, 1909, and do HEREBY CERTIFY the same to be a correct transcript therefrom and of the whole of said original.

WITNESS my hand and the seal of office of the Secretary of State, at the City of Albany, this

nineteenth day of October, one thousand nine hundred and twenty.

[Seal] C. W. TAFT,
Second Deputy Secretary of State.

[Endorsed]: No. 3716. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 15, 1921. F. D. Monckton, Clerk. Defts. "A."

NO. 3716

United States
Circuit Court of Appeals
For the Ninth District

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a Corporation, E. S. PEGRAM and GUSTON BORGLUM,

Defendants in Error.

Supplemental Transcript of Record

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Filed

NO. 3716

United States

Circuit Court of Appeals

For the Ninth District

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a Corporation, E. S. PEGRAM and GUSTON BORGLUM,

Defendants in Error.

Supplemental Transcript of Record

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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No. 5225.

THE NORTH AMERICAN INDIAN, INC., a corporation,

Plaintiff.

vs.

E. S. PEGRAM and GUTSON BORGLUM,

Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, formerly husband and wife, and CURTIS STUDIO,

Defendants.

PRAECIPE FOR SUPPLEMENTAL TRANSCRIPT OF RECORD.

To The Honorable F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, Northern Division:

Please prepare and return supplemental transcript of the following papers and records in Cause No. 5225, with the Writ of Error in the above entitled cause:

1. Order extending time for filing supplemental transcript.

2. Third Party Claim of Sue Phillips Gates and Marshal's supplemental return on third party claim of Sue Phillips Gates.

3. Motion of Defendant, Clara J. Curtis, for cost bond.

4. Cost bond of non-resident with the United States Fidelity & Guaranty Company as surety.

WRIGHT and WRIGHT and
POE and FALKNOR,
Attorneys for Plaintiffs.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division. Sept. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a corporation,

Plaintiff.

E. S. PEGRAM and GUTSON BORGLUM,
Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, formerly husband and wife, and CURTIS STUDIO,

Defendants.

ORDER EXTENDING TIME FOR FILING SUPPLEMENTAL TRANSCRIPT.

The plaintiffs, who are defendents in error on appeal in the above entitled cause, having applied to this court for an order extending time for having prepared supplemental transcript herein necessary to the proper consideration of the appeal in this cause, and good cause appearing therefor, it is hereby

ORDERED that the time may be extended for the preparation of said supplemental transcript of record on appeal, and the printing, filing and serving of the same, until up to and including September 14, 1921.

Done in open court this 6th day of September, 1921.

JEREMIAH NETERER, Judge.

Endorsed: Filed in the United States District Court Western District of Washington, Northern Division, Sept. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

STATE OF WASHINGTON,
County of King
ss. No. 5225

To John M. Boyle, United States Marshal for the Western District of Washington:

I, Sue Phillips Gates, being first duly sworn, on oath depose and say: That I am not a defendent in that certain action numbered 5225 now pending in the United States District Court, for the Western Dis-

trict of Washington, Northern Division, nor the agent of any of the defendents therein. That I am the owner of the folowing described property which, acording to your return on file in said action, you have wrongfully taken possession of under a void writ of replevin issued in said action, and held in posession in No. 64 Cobb Building, in the city of Seattle, King County, State of Washington, towit:

One large cabinet full of reviews of North American Indian; one box containing records, maps, and field material; one box containing Indian Costume Material; one box containing Indian maps and files; one large assortment of Indian negatives, transparencies, records and manuscripts; assortment of negatives and positive plates 6½x8½ size; Indian subjects numbering from 1 to 38000, as listed in four record books of corresponding numbers; 729 negatives and positive plates 14x17; fifty-one negatives and positive plates 18x22; nineteen negatives and positive plates 16x20; one box containing Indian clippings, with manuscript descriptive thereof; one large assortment of portfolios and books of North American Indian; 16 large bound portfolios; 19 volumes of North American Indian, ¾ Morocco, 6 volumes of North American Indian in cloth; one package of folio prints; one small package of prints; assorted portfolio, prints unbound; one volume of Indian Days Long Ago, in cloth; four book cases and contents; one large assortment of Indian Baskets, Pottery and Indian Curios;

That my title to the whole of said property was derived directly from one Clara J. Curtis, who prior to the 24th day of June, 1919, owned an interest therein as composing one of the community of which the other member was Edward S. Curtis, and who on said day was by the decree of the Superior Court of the State of Washington, for King County, divorced from said Edward S. Curtis, and in said decree the title to the whole of said above described property was vested in Clara J. Curtis, as her sole and separate property, free and clear of any claim of title therein, or of any part thereof, of said Edward S. Curtis. That on the tenth day of April, 1920, the said Clara J. Curtis, for a valuable consideration unto her passing from me, sold and conveyed and warranted the title of and to the whole of said above described property to me, ever which said time I have been and now am, the sole and exclusive owner of said above described property, and of the whole thereof, and hereby make claim therefore, and for the whole thereof, and as such owner I hereby demand that you immediately release said above described property, and the whole thereof, and deliver the same, and the whole thereof, to me, and into my posession.

SUE PHILLIPS GATES,

Subscribed and sworn to before me this twenty-second day of April, A. D. 1920.

John G. Barnes,

(Notary Seal) Notary Public in and for the State of Washington, residing at Seattle.

MARSHAL'S SUPPLEMENTAL RETURN ON THIRD PARTY CLAIM OF SUE PHILLIPS GATES.

BE IT REMEMBERED, That the hereunto attached third party claim of Sue Phillips Gates was served on me as United States Marshal on the 22nd day of April, 1920. That I thereupon notified the plaintiff thereof, and demanded it indemnify me against such claim, whereupon the hereunto attached bond of the plaintiff was delivered to me on the 23rd day of April, 1920, and that thereupon I held the said property in pursuance to the writ of replevin in the cause.

Dated at Seattle, Washington, in said District on this 12th day of May, 1920.

JOHN M. BOYLE,
U. S. Marshal,
By W. E. Theodore, Deputy

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 15, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 5225.

DEMAND OF CLARA J. CURTIS FOR SECURITY FOR COSTS.

THE NORTH AMERICAN INDIAN, INC.,

Plaintiff,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, formerly husband and wife, and CURTIS STUDIO,

Defendants.

Comes now the defendant above named, Clara J. Curtis, by John G. Barnes, her attorney, and demands and requires security for the costs and the charges which may be awarded against plaintiff in this action, it appearing from the face of the complaint herein that the plaintiff is a corporation having its principal place of business without the district of this court, and without the State of Washington.

It is further required that all proceedings whatsoever in this action, or suit, may be stayed until such security be given.

This demand is based upon the complaint in this action.

JOHN G. BARNES,
Attorney for defendant Clara J. Curtis,
Room 1017 White Building, Seattle, King County, State of Washington.

Service of within demand and receipt of copy admitted this 10th day of May, 1920.

WRIGHT & WRIGHT,
Attorneys for Plaintiff.

We hereby designate Room No. 1017 White Building, 4th Ave. at Union Street, Seattle, Washington, as the place where all subsequent papers, herein, except writs and process may be made upon the attorney herein, and consent that service of all subsequent papers herein, except writs and process, may be made as the place hereinabove designated upon the said John G, Barnes. Dated May 10th, 1920.

JOHN G. BARNES,
CLARA J. CURTIS.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 17, 1920. F. M. Harshberger, Clerk. S. E. Leitch, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 5225

BOND FOR COSTS.

THE NORTH AMERICAN INDIAN, INC., a corporation,

Plaintiff.

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, formerly husband and wife, and CURTIS STUDIO,

Defendants.

KNOW ALL MEN BY THESE PRESENTS, that UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and authorized to do business in the State of Washington, as surety, and NORTH AMERICAN INDIAN, INC., a corporation, plaintiff in the above entitled action, as principal, are held and firmly bound unto the defendant Clara J. Curtis one of the defendants above named, in the just and full sum of three-hundred ($300.00) Dollars, for the payment of which sum, well and truly to be made, both the principal and surety binds itself, and its successors or assigns, jointly and severally, firmly by these presents.

Sealed and dated this 17th day of May, A. D. 1920.

The conditions of this Obligation are such, that whereas, the plaintiff in the above entitled action, being a non-resident of the Western District of Washington, Northern Division, and without the State of Washington, and the defendant Clara J. Curtis, one of the defendants in the above entitled action, has required security for costs, and charges in this suit, as more fully appears from her written demand therefore, and attached to an alleged insufficient bond for costs and herein on file, and which may be awarded against said plaintiff,

And whereas, John G. Barnes, attorney for the said

Clara J. Curtis, contends that the said bond heretofore filed, is insufficient in amount and in form,

And Whereas counsel for plaintiff having agreed to file a bond for costs to meet the objection of the said John G. Barnes,

NOW THEREFORE, if the said plaintiff in the above entitled action shall pay, or cause to be paid, such costs and charges as may be awarded against it by judgment, or in the progress of this action, not exceeding the sum of $300.00, then this obligation shall be void; otherwise to remain in full force, effect and virtue.

AND IT IS FURTHER STIPULATED that the surety herein agrees that in case of a breach of any condition of this obligation, the above entitled Court may upon notice to it of not less than ten days, proceed summarily in this action to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment therefore against it, and award execution therefore.

NORTH AMERICAN INDIAN, INC.,
Principal,
By WRIGHT & WRIGHT,
Attorneys of Record.
By ELIAS A. WRIGHT,
UNITED STATES FIDELITY &
GUARANTY CO., Surety.
By John C. McCollister, Atty.-in-Fact.
(Seal
U. S. F. & G. Co.)

APPROVED: Edward E. Cushman, Judge.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 17, 1920. F. M. Harshberger, Clerk. S. E. Leitch, Deputy.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 3716

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

DESIGNATION BY DEFENDANTS IN ERROR OF EXHIBITS TO BE PRINTED.

Comes now the defendants in error in the above entitled action by Wright & Wright and Poe & Falknor, their attorneys, and make the following designation of exhibits to be printed:

1.

Plaintiff's Exhibit "1."

WRIGHT and WRIGHT and
POE and FALKNOR,
Attorneys for Defendants in Error.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Sept. 6, 1921. F. M. Harshberger, Clerk. S. E. Leitch, Deputy.

3225

3328 Pltfs. Ex. No. 1.

THIS AGREEMENT, made this 21st day of December, 1909, by and between EDWARD S. CURTIS of Seattle, Washington, (hereinafter) called the vendor), and THE NORTH AMERICAN INDIAN, a corporation organized and existing under the laws of the State of New York, (hereinafter called the "Corporation"),

WHEREAS, For many years heretofore the Vendor has been and now is engaged in the publication of an important work known as "The North American Indian" and has created and incurred assets and liabilities substantially as set forth in the balance sheet marked "Schedule A" hereunto annexed, the net assets and the fair value thereof having been appraised by the standard Audit Company of the City of New York as set forth in the Statement marked "Schedule B" hereunto annexed; and

WHEREAS, The said schedule A includes a subscription in the name of J. Pierpont Morgan for 25 sets of the work for the price of $75,000, of which $60,000 has been paid to the Vendor, but said payment by said J. Pierpont Morgan was in fact made upon the agreements of the Vendor set forth in a writing

signed by the Vendor under date of March 30, 1906 (of which said writing a copy is hereto annexed marked Schedule C), which said agreements on the part of the Vendor also are liabilities of the said business; and

WHEREAS, The Vendor desires to incorporate the said business and the Corporation desires to acquire and henceforth to conduct the same, provided that, and not otherwise, the Vendor will agree to devote and to render his best skill and services exclusively in the prosecution of the business and to the preparation and publication of the said work and to protect his said undertaking by procuring and assigning to the Corporation an insurance upon his life in the amount of at least sixty thousand dollars ($60,000.00); and

WHEREAS, In the opinion and judgment of the board of directors of the Corporation it has been and is hereby determined that the fair value of the said business to the Corporation for its said purposes is equal to at least the sum of $50,000.

NOW, THEREFORE, In consideration of the premises and of the sum of one dollar ($1.00) by each of the said parties to the other in hand paid, and in consideration of the mutual promises herein contained, it is hereby covenanted and agreed between the parties as follows, to wit:

FIRST:

(1) The Vendor hereby sells, transfers, assigns

and sets over unto the Corporation the said business heretofore conducted by him in the publication of the said The North American Indian, and all the property and assets of every name and nature by him employed in connection therewith, including all copyrights, subscriptions, subscription rights, publications and material for publication, plates, prints and printed books, illustrations and material of every name, including choses in action and rights of action; but subject to all the liabilities in respect of such business, which the Vendor covenants are fully and truly set forth in the Schedules A, B and C hereunto annexed and forming part of this agreement.

(2) The Vendor for and during the period necessary for the complete preparation and publication of the said work will render and devote to the Corporation exclusively his best skill and services at the annual salary of five thousand dollars ($5,000) payable in equal monthly installments; the Corporation to have the right to terminate such employment upon not less than three months' notice, expiring with the 31st day of December in any year.

In protection of this stipulation the Vendor will cause his life to be insured for the benefit of the Corporation in some company satisfactory to the Corporation in the sum of not less than sixty thousand dollars ($60,000), and will cause such policy to be executed or assigned in such form as shall secure to the Corpor-

ation the benefit thereof. The premiums upon such policy shall be paid and shall be payable as part of the expenses of the business of the Corporation.

(3) The Vendor will pay or cause to be paid into the treasury of the Corporation for its corporate purposes and for the discharge of its liabilities, the sum of fifty-nine thousand dollars ($59,000) in money in consideration of the issue therefor at par of five hundred and ninety (590) shares of the preferred stock of the Corporation.

It being expressly stipulated that none of the unissued shares of the preferred stock shall be issued except with the consent of the holders of a majority of the preferred stock outstanding at the time of such consent, nor shall the preferred or common stock be increased without like consent of the holders of a majority of such preferred stock.

(4) From time to time the Vendor will make, execute and deliver, or cause to be made, executed and delivered, to the Corporation, good and sufficient assignments of any and all copyrights owned or employed by him in connection with his said business and property hereby sold and assigned, or hereafter obtained by him, and also any and all other assignments, bills of sale or instruments of further assurance as shall be necessary or proper more completely to vest in the Corporation the title to said business and property of the Vendor, including copyrights and

trade-marks or names, or as shall be requested by the Corporation for such purpose.

SECOND:

The Corporation hereby accepts the transfer and assignment of the said business of the Vendor at the price and valuation of fifty thouand dollars ($50,000) and accepts the subscription of the Vendor for five hundred and ninety shares of the preferred stock of the Corporation at par. In consideration of such transfer and such payment the Corporation will forthwith issue or cause to be issued to the said vendor or his nominee, five hundred shares of the common stock of the Corporation of the aggregate par value of fifty thousand dollars ($50,000), and five hundred and ninety shares of the preferred stock of the Corporation of the aggregate par value of fifty-nine thousand dollars ($59,000), the proceeds of such preferred stock to be applied in payment of existing liabilities; and all the stock so issued to be fully-paid and non-assessable.

IN WITNESS WHEREOF, The party of the first part has affixed his hand and seal and the party of the second part has caused its corporate seal to be affixed hereto, and these presents to be signed in its name by its officers duly authorized, the day and year first above written.

EDWARD S. CURTIS (Seal).

THE NORTH AMERICAN INDIAN,
(Corporate) By Robert C. Morris,

(Seal) Vice President.

(LS)

Attest:

F. Gordon Brown, Secretary.

(SCHEDULE A.)

PERLEY MORSE, HENRY CLARK DAVIS

Certified Public Accountant, President. Certified Public Accountant, Secretary.

STANDARD AUDIT COMPANY,

41-43 Wall Street
43-49 Exchange Place
New York
Telephone 7677-7678 Hanover
Cable Address "Standit"

December 7, 1909.

Mr. Edward S. Curtis,
437 Fifth Avenue,
New York, N. Y.

Dear Sir:

As requested by you, we hand you herewith two Exhibits, as follows:

Exhibit "A"—General Balance Sheet as of October 31, 1909.

Exhibit "B"—Statement of Resources and their Disposition as of October 31, 1909.

The total net resources are, approximately, $130,-

139.80, as appears in Exhibit "B." This amount is approximate for the reason that it was impossible to segregate exactly the field work done on the volumes already issued from that done on the volumes yet to be issued. Where there was any doubt the work was charged to the books already issued. The actual resources would, therefore, be increased by whatever amount was so charged to the cost of the book already issued in excess of the cost of the actual field work done on them.

Resectfully submitted,
STANDARD AUDIT COMPANY,
Perley Morse,
Certified Public Accountant,
President.

Attest:
Henry Clark Davis,
Certified Public Accountant,
Secretary.
(Corporate)
(Seal)

EDWARD S. CURTIS
GENERAL BALANCE SHEET AS OF OCTOBER 31, 1909.
Exhibit A

ASSETS			LIABILITIES		
Invested Assets:					
Inventory—Estimated:					
Field Work	$44,775.23				
Paper	1,400.00				
Plates	17,303.74				
Presswork	2,703.96				
Unbound books and folios at Hy. Blackwell's	40,145.68				
Bound books and folios	25,655.22				
Total Invested Assets		$131,983.83			
Current Assets:			**Current Liabilities:**		
Cash on hand and in bank	$ 669.48		Accounts Payable	$7,687.11	
Accounts Receivable—			Bills Payable	38,457.46	
Subscriptions	10,462.50		Commissions	3,444.30	
Henry Blackwell	695.02		Curtis Studio Advances	15,000.00	
Wm. Dinwiddie	3,660.30		**Total Current Liabilities**		$ 64,588.87
Frank Donohue	15,693.95		**Deferred Liabilities:**		
Total Current Assets		31,181.25	Subscriptions paid in advance	$74,162.50	
Deferred Assets:			**Total Deferred Liabilities**	74,162.50	
Discount	$ 3,881.25		**Advanced by E. S. Curtis**	$45,700.00	
Commissions	8,541.00		Net Income per Exhibit "B"	5,542.99	
Suspense Account	8,022.59			$51,242.99	
Total Deferred Assets		20,444.84	Less:		
			E. S. Curtis Drawing A/c	6,384.44	44,858.55
		$183,609.92			$183,609.92

EDWARD S. CURTIS

STATEMENT OF RESOURCES AND THEIR DISPOSITION AS OF OCTOBER 31, 1909

RESOURCES:		
Field work on unissued books	$44,775.23	
Paper on hand	1,400.00	
Plates on hand	17,303.74	
Presswork on hand	2,703.96	
Unbound books and folio at Henry Blackwell's	40,145.68	
Bound books and folios on hand	25,655.22	$131,983.83
Cash in bank		669.48
Unpaid subscriptions		10,462.50
Due from Wm. Dinwiddie		3,660.30
Due from Frank Donohue		15,693.95
Commissions paid on subscriptions paid in advance		8,541.00
Expenses paid in advance and not classified		8,717.61
Total assets		$179,728.67
Less:		
Accounts Payable	$ 7,687.11	
Bills Payable	38,457.46	49,588.87
Unpaid Commissions	3,444.30	
		$130,139.80
TOTAL RESOURCES		
DISPOSITION:		
Advances by E. S. Curtis (Net)	$39,315.56	
Advances by Curtis Studio	15,000.00	
Subscriptions paid in advance (Net)	70,281.25	
Profit on volumes issued	5,542.99	
TOTAL DISPOSITION		$130,139.80

Exhibit B

STANDARD AUDIT COMPANY

Perley Morse
Certified Public Accountant
President

Henry Clark Davis
Certified Public Accountant
Secretary

41-43 Wall Street
43-49 Exchange Place
NEW YORK
Telephone 7677-7678 Hanover
Cable Address "Standit"

December 28, 1909.

Mr. Edward S. Curtis,
437 Fifth Avenue

New York, N. Y.

Dear Sir:—

As instructed by you we submit herewith a "Schedule of the Subscriptions Received, to October 31, 1909, showing the amounts of the original subscriptions; and the status of the accounts at October 31, 1909," as shown in the General Balance Sheet heretofore submitted to you.

The subscription of J. McLean was originally for the entire set of books, but as it was cancelled after the delivery of the first two volumes, we have shown it as a subscription for one tenth of the set.

Whenever a discount was allowed it was for the payment of the full subscription in advance, and was charged by us in the statement (partly estimated) of the Net Worth at October 31, 1909, against the deliveries of the first five volumes. That is, the liability set up for "Subscriptions paid in Advance" is the full subscription price for the last fifteen volumes, except in the case of Mr. Morgan. In that account there is still unpaid under the agreement made in 1906 between Mr. Morgan and Mr. Curtis, three payments of $5,000.00 each. While the agreement calls for twenty five sets, deliveries have been made on this account of the first five volumes of twenty-six sets, part of which had special bindings for which an extra charge of $1,062.50 was made and paid.

The column headed "Due from Subscribers for the first five volumes' 'shows the balances uncollected at October 31, 1909, for the deliveries of those volumes.

Respectfully submitted,

STANDARD AUDIT COMPANY,
PERLEY MORSE,
Certified Public Accountant,
President.

(Corporate)
(Seal)

Attest:
Henry Clark Davis,
Certified Public Accountant,
Secretary.

EDWARD S. CURTIS

SCHEDULE OF SUBSCRIPTIONS RECEIVED TO OCTOBER 31, 1909.

SHOWING THE AMOUNTS OF THE ORIGINAL SUBSCRIPTIONS AND THE STATUS OF THE ACCOUNTS AT OCTOBER 31, 1909.

NAME	Subscription		Deliveries Volumes	Charge for Deliveries	Credit		Balance	
	Sets	Amount			Cash	Discount	Due from Subscribers for 1st 5 Volumes	Subscriptions Paid in Advance
Alden J. Blethen	1	$ 3,000.00	5	$ 750.00	$ 2,250.00	$ 750.00		$ 2,250.00
W. K. Bixby	1	3,850.00	5	962.50	2,887.50	962.50		2,887.50
Geo. D. Barron	1	3,850.00	5	962.50	3,000.00	850.00		2,887.50
Mrs. Wm. Hy. Bliss	1	3,200.00	4	640.00	640.00			
Miss Charlotte Bowditch	1	3,000.00	5	750.00	750.00			
Chas. M. Bair	1	3,850.00	5	962.50	1,000.00			37.50
Samuel S. Boyden	1	4,400.00	5	1,100.00	1,200.00			100.00
Wm. H. Bartlett	1	3,000.00	5	750.00	2,200.00			1,450.00
Parker Corning	1	3,000.00	5	750.00	750.00			
Andrew Carnegie	1	3,850.00	5	962.50	1,500.00			537.50
Mrs. J. C. Colgate	1	3,000.00	5	750.00	750.00			
Albro E. Chase	1	4,400.00	5	1,100.00			1,100.00	
B. P. Cheney	1	3,000.00	5	750.00	750.00			
Cleveland H. Dodge	1	3,000.00	5	750.00	750.00			
Cleveland H. Dodge	1	3,000.00	5	750.00	750.00			
Dr. James Douglas	1	3,850.00	5	962.50	3,000.00	850.00		2,887.50
Robert E. Davie	1	3,000.00	5	750.00	750.00			
Miss Henrietta Failing	1	3,000.00	5	750.00	750.00			
Free Public Library, New Bedford, Mass.	1	3,000.00	5	750.00	750.00			
Mrs. Robert Garrett	1	3,850.00	5	962.50	962.50			

Samuel Hill	1	3,200.00	5	800.00	3,000.00	200.00		2,400.00
Hackley Public Library	1	3,000.00	5	750.00	750.00			
S. V. Hoffman	1	3,000.00	5	750.00	750.00			
F. W. Hodge, Editor	1	3,000.00	5	750.00			750.00	
J. J. Hill	1	3,000.00	5	750.00	750.00			
A. F. Hyde	1	3,000.00	5	750.00	750.00			
H. E. Huntington	1	3,000.00	2	300.00	300.00			
Eldridge R. Johnson	1	3,000.00	5	750.00	750.00			
Librarian of Congress, for copyright	2	6,000.00	10	1,500.00			1,500.00	
Los Angeles Public Library	1	3,000.00	5	750.00	750.00			
Mrs. H. J. Lewis	1	3,000.00	5	750.00	350.00		400.00	
D. J. Mitchell	1	3,850.00	5	962.50	962.50			
C. A. Moore, Jr.	1	3,000.00	5	750.00	750.00			
Dr. Lewis R. Morris	1	3,000.00	5	750.00	3,000.00			2,250.00
Forward	35	$114,150.00		$27,927.50	$ 38,252.50	$3,612.50	$ 3,750.00	$17,687.50

Forward	35	$114,150.00		$27,927.50	$ 38,252.50	$3,612.50	$ 3,750.00	$17,687.50
Robt. W. Miers	1	3,850.00	5	962.50	962.50			
Judge Moore	1	3,850.00	5	962.50	3,850.00			2,887.50
Minneapolis Athenaeum	1	3,000.00	5	750.00	750.00			
Metropolitan Museum of Art	1	3,000.00	2	300.00	300.00			
J. McLean	1/10	300.00	2	300.00	300.00			
Mrs. W. N. McMillan	1	3,200.00	5	800.00	800.00			
J. P. Morgan	26	78,000.00	130	20,562.50	61,062.50			40,500.00
Thos. C. Noyes	1	3,850.00	5	962.50			962.50	
E. W. Olney	1	3,000.00	5	750.00	450.00		300.00	
J. J. Phillips	1	3,000.00	5	750.00	3,000.00			2,250.00
Gifford Pinchot	1	3,000.00	5	750.00	750.00			
Peabody Institute	1	3,000.00	5	750.00	750.00			
W. W. Phillips	1	3,200.00	5	800.00			800.00	
Portland Public Library	1	3,200.00	5	800.00			800.00	
D. G. Reid	1	3,850.00	5	962.50	962.50			
E. Francis Riggs	1	3,000.00	5	750.00	750.00			

Mrs. M. E. Ryan	1	3,850.00	5	962.50	962.50			
The Rainier Club	1	3,200.00	5	800.00			800.00	
Fred S. Stimson	1	3,000.00	5	750.00	750.00			
Seattle Public Library	1	3,000.00	5	750.00	750.00			
H. P. Strickland	1	3,850.00	5	962.50	962.50			
C. S. Sheldon	1	3,000.00	5	750.00	750.00			
F. M. Smith	1	3,000.00	5	750.00	750.00			
F. E. Sanders	1	3,000.00	5	750.00			750.00	
Mrs. C. D. Stimson	1	3,000.00	5	750.00	750.00			
St. Louis Mercantile Library Assn	1	3,000.00	5	750.00	600.00		150.00	
Lord Strathcona	1	3,000.00	5	750.00			750.00	
Mrs. Janes A. Tracy	1	3,000.00	5	750.00	750.00			
Mrs. F. F. Thompson	1	3,000.00	5	750.00	1,500.00			750.00
J. Elmore Turrell	1	3,200.00	5	800.00	400.00		400.00	
Jno. R. Van Wormer	1	3,000.00	5	750.00	500.00		250.00	
Mrs. Fred W. Vanderbilt	1	3,000.00	2	300.00	3,000.00			2,700.00
Alex. Van Rensselaer	1	3,000.00	5	750.00	750.00			
Theo. N. Vail	1	3,850.00	5	962.50	2,887.50	962.50		2,887.50
John Jay White, Jr.	1	3,000.00	5	750.00	2,400.00	600.00		2,250.00
C. C. Worthington	1	3,000.00	5	750.00	750.00			
Mrs. Emma H. Ward	1	3,000.00	5	750.00	3,000.00			2,250.00
H. Walters	1	3,000.00	5	750.00	750.00			
Mrs. Fanny Annet Whitney	1	3,000.00	5	750.00	750.00			
University of Washington, (E. S. C.)	1	3,000.00	5	750.00			750.00	
TOTAL	99 1/10	$313,400.00		$78,127.50	$136,652.50	$5,175.00	$10,462.50	$74,162.50

Schedule 28 A

STANDARD AUDIT COMPANY

Perley Morse
Certified Public Accountant
President

Henry Clark Davis
Certified Public Accountant
Secretary

41-43 Wall Street
43-49 Exchange Place
NEW YORK
Telephone 7677-7678 Hanover
Cable Address "Standit"

December 10, 1909.

To

The Board of Directors of

"The North American Indian".

Gentlemen:

We have prepared a statement of the Net Worth of "The North American Indian" (partly estimated) at October 31, 1909, and a memorandum as to the status of the subscriptions received up to that date, (see schedule hereto attached).

In our judgment, after eliminating all doubtful assets, the Net Worth at October 31, 1909, was $54,-692.96. In arriving at this amount we did not take into consideration any money value for the ten years time devoted to this work by Mr. Edward S. Curtis.

Of the subscriptions received there was due and unpaid at October 31, 1909, for the five volumes which had been delivered to subscribers, the sum of $10,-462.50, which is included in the Net Worth. There had been paid in advance of the delivery of the remaining fifteen volumes the net sum of $70,281.25, leaving the net sum of $156,162.50 to be collected upon

the delivery of the remaining fifteen volumes of the sets already subscribed.

Respectfully submitted,
STANDARD AUDIT COMPANY,
Perley Morse,
Certified Public Accountant,
President.

(Corporate)
(Seal)
Attest: Henry Clark Davis,
Certified Public Accountant,
Secretary.

THE NORTH AMERICAN INDIAN.

STATEMENT OF NET WORTH AT OCTOBER 31, 1909, AND MEMORANDUM AS TO SUBSCRIPTIONS RECEIVED

RESOURCES:		
Field work on unissued books (estimated)	$55,000.00	
Paper on hand	1,400.00	
Plates on hand	17,303.74	
Presswork on hand (estimated)	3,500.00	
Books and pictures on hand exclusive of binding (partly estimated)	69,910.00	
Binding of bound books and folios on hand (partly estimated)	2,940.00	$150,053.74
Cash in bank		669.48
Unpaid subscriptions		10,462.50
Commissions on subscriptions paid in advance		8,541.00
Expenses paid in advance—not classified		8,717.61
TOTAL RESOURCES		$178,444.33
LESS:		
Accounts Payable	$ 7,687.11	
Bills Payable	38,457.46	
Unpaid Commissions	3,444.30	
Subscriptions paid in advance	74,162.50	123,751.37
NET WORTH		$ 54,692.96

MEMORANDUM AS TO SUBSCRIPTIONS RECEIVED

TOTAL SUBSCRIPTIONS RECEIVED	$308,462.50	
Less: Discounts allowed	5,175.00	
TOTAL NET SUBSCRIPTIONS RECEIVED	303,287.50	
Less: Five Volumes delivered (Net)	76,843.75	
TOTAL UNFILLED SUBSCRIPTIONS		$226,443.75
Less: Payments in advance of delivery		70,281.25
TOTAL UNFILLED SUBSCRIPTIONS NOT PAID IN ADVANCE		$156,162.50

Schedule C.

New York, March 30, 1906.

I, Edward S. Curtis, of the City of Seattle, State of Washington, having been engaged in the collection of material for a work to be known as the Curtis Indian Pictures, illustrating the customs, manners and mode of life of the North American Indians, and designed to historically perpetuate in photographs and description a knowledge of that race, and having already collected a large number of photographic plates, negative and positive, and manuscripts notes and data for said work, and being desirous of continuing and completing the same, and it being estimated that the cost of so doing will be Seventy-five thousand dollars ($75,000.00) to be expended at the rate of Fifteen Thousand dollars ($15,000.00) per annum for a period of five years, do hereby agree that in consideration of the advancement to me by J. Pierpont Morgan of the said sum from time to time as needed for that purpose, I will deliver to, and store in the safe deposit vaults of the Seattle Safe Deposit Vaults, incorporated, in its safe deposit building No. 701 First Avenue in the City of Seattle, Washington, all the Indian photographic plates, negative and positive, now owned by me in my possession in my studio in the Downs Building, No. 709 Second Avenue, Seattle, Washington, and also all the Indian manuscripts, notes and data heretofore prepared by me in my possession at said place, and that I will in

like manner from time to time deliver to said Seattle Safe Deposit Vaults of such place, manuscripts, notes and data that I may hereafter prepare or obtain for said Curtis Indian Pictures, and that I will deliver the storage warehouse receipts therefor from time to time, and forthwith as the said articles are deposited, to the said J. Pierpont Morgan, with the right, however of access thereto, and of temporarily removing the same or any part thereof for the purpose of preparing said work for publication and for the publication of the same.

Upon the completion and publication of said work, which shall be without cost and expense to, or liability on the part of, the said J. Pierpont Morgan, other than the sum to be advanced as aforesaid, I will deliver to him twenty-five copies of said publication of the Curtis Indian Pictures and text, and also three hundred copies each of the large photographs and two hundred copies each of the small photographs, the same to be accepted and received by him in full satisfaction and discharge for the sums of money so advanced, it being understood that I am, and shall be, under no liability to repay any part of the same except in this way.

Should I be unable to complete the work of collecting the material for said Curtis Indian Pictures, either by reason of death, permanent illness or other unavoidable casualties, than I, or my estate, shall have the right to make publication of the then com-

pleted portion of the work and to deliver to the said J Pierpont Morgan the number above specified of copies of said work and photographs respectively, and Mr. J. Pierpont Morgan is to receive the same in settlement of all the amounts that he may have paid to me up to that time, and no further payments to me or to my estate are to be made by him unless agreeable to Mr. J. Pierpont Morgan. Should any amount paid by Mr. J. Pierpont Morgan and received by me at such time be unexpended by me in connection with this work, then said amount is to be returned to Mr. J. Pierpont Morgan.

Edward S. Curtis.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

No. 5225

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC.,
E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify this printed transcript of record, consisting of pages numbered from 1 to 33, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the supplemental record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges, incurred and paid in my office on behalf of the defendants in error for making supplemental record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to-wit:

Clerk's Fees (Sec. 828, R. S. U. S) for making record, certificate or return 75 folios at 15c	$11 25
Seal to said certificate	0 20
Certificate of Clerk to transcript of record, 4 folios at 15c	0 60
Statement of cost of printing said transcript	96-62

I hereby certify that the above cost for preparing

and certifying record and cost of printing amounting to $108.67, has been paid to me by attorneys for defendants in error.

In Witness Whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 14th day of September, A. D., 1921.

F. M. HARSHBERGER,

Clerk United States District Court, Western District of Washington.

(Seal)

No. 3716

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Plaintiff in Error

JOHN G. BARNES,
Attorney for Plaintiff in Error.

507 Marion Building,
Seattle, Washington.

PRESS OF PLINY L. ALLEN CO., SEATTLE

FILED
SEP - 3 1921
F. D. MONCKTON

No. 3716

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Brief of Plaintiff in Error

JOHN G. BARNES,
Attorney for Plaintiff in Error.

507 Marion Building,
Seattle, Washington.

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

On the 19th day of April, 1920, defendant in error, The North American Indian, Inc., filed a complaint in the United States District Court for the Western District of Washington, Northern Division, against

Edward S. Curtis, and Clara J. Curtis, formerly husband and wife, as defendants.

It is alleged in the complaint that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in New York City. That until within the last year defendants were husband and wife, doing business as Curtis Studio. That the defendants were wrongfully and unlawfully in possession of a large amount of personal property belonging to the plaintiff, and denied the right of possession to plaintiff, and wrongfully and unlawfully held possession of said property notwithstanding the plaintiff had demanded possession thereof.

The property was described as being:

> 1 motion picture re-wind; 2 boxes of lantern slides; 1 net; 2 boxes of phonograph records; 1 camp equipment; 1 box containing clippings, articles and reviews of the North American Indian; 1 Indian saddle; 1 phonograph; two bundles of 3 tents each; 1 tripod; a large cabinet full of reviews of North American Indian; large assortment of motion picture materials and flash powder; 1 typewriter case; 1 box containing records, maps and field material; 1 box containing Indian costume material; 1 box containing Indian reports and files; a large assortment of Indian negatives, transparencies; records and manuscript; 1 box containing Indian clippings with manuscript descriptive thereof; 1 box containing Indian tents and camp equipment; large assortment of Indian reviews; 1 large assortment of portfolios and books of North American

Indian; 4 bookcases and contents; large assortment of Indian baskets; pottery, Indian blankets and Indian curios.

That the property was worth the sum of Ten Thousand Dollars, and that defendants refused to deliver possession to plaintiff. That by reason of the wrongful withholding of possession of the property plaintiff had been damaged in the sum of Five Thousand Dollars, and would suffer other and greater damage. That the property had not been taken by defendants for a tax, assessment or fine pursuant to the statute, or seized under execution or attachment against the property of plaintiff. The prayer is for judgment against the defendants, and each of them, "for the recovery of the possession of the said personal property, and in case possession thereof cannot be had, then, for judgment against the defendants in the sum of $10,000.00, the value thereof", $5,000.00 damages for wrongfully withholding possession, and for costs and disbursements.

The complaint is verified by the affidavit of E. A. Wright who states therein that the plaintiff is a corporation organized under the laws of the State of New York, that there is no office within the State of Washington, and that, as its attorney, he was authorized to make the verification on behalf of plaintiff, because it was not within the State of Washington.

A summons was issued which was never served on the defendant Edward S. Curtis, and was served on plaintiff in error on the 28th day of April, 1920.

Simultaneously with the filing of the complaint and issuance of summons said E. A. Wright, as attorney for the plaintiff corporation, filed his affidavit in the court and cause, in which the property is described the same as in the complaint, but its location, either city, county, state or district, is not given, or referred to in any manner. Otherwise the affidavit contains the averments required by section 708 of Remington's Code of Washington. With the affidavit there was also filed in the court and cause a bond in the sum of Twenty Thousand Dollars, and application made to the court to order the issuance of a writ of replevin. Thereupon, and on said 19th day of April, the judge indorsed upon the bond his approval thereof, and made and entered an order in the case that

> "it appearing from the plaintiff's complaint on file and the affidavit in support thereof, that the cause of action for replevin is stated therein, and it further appearing that the plaintiff has furnished good and sufficient bond to the defendants in this action, now therefore, it is hereby ordered that writ of replevin issue in this action directed to the marshal to take possession of the property."

In pursuance of said order the clerk immediately issued a writ of replevin.

On the 21st day of April, 1920, the Marshal filed the writ of replevin in the court and cause, with his return attached thereto.

Proceeding in accordance with rule 22 of the

District Court, plaintiff in error appeared specially and moved the Court to dismiss the action:

1. Because neither the residence, nor citizenship, of the defendants was alleged in the complaint, and therefore, no diversity of citizenship to give the Court jurisdiction; 2. To quash and annul the writ of replevin for the reason that the Court was wholly without jurisdiction to issue said writ; 3. To quash and annul the execution of the writ of replevin by the Marshal, and to order him to forthwith return all the property he took under the writ to the place from whence he took it, for the reasons that the affidavit did not allege the location of the property described therein to be within the jurisdiction of the court; that the bond was not filed with the marshal, or ever approved by him, and that no service of the affidavit or bond had ever been made upon her.

The motions were heard on the 17th day of May, 1920. The Court permitted counsel to amend the complaint by interlineation so that it would show residence of defendants, and denied the motion to quash the writ of replevin, and its execution by the marshal, to which rulings plaintiff in error took exceptions and the same were embodied in the signed order of the court.

Plaintiff in error answered the complaint by specifically denying each and every of the allegations therein, and the whole thereof, excepting only the allegation that the property described therein was worth the sum of Ten Thousand Dollars, which was expressly admitted to be true, and the allegation

that the property had not been taken by defendants for a tax, etc., as to which nothing was said.

The defendant Edward S. Curtis appeared voluntarily, and in his answer to the complaint denied that he was wrongfully or unlawfully in possession of the property described in the complaint, which he expressly admitted belonged to, and was owned by the plaintiff, and denied that he wrongfully, or unlawfully held possession thereof. Denied that the property described was worth the sum of Ten Thousand Dollars, and that plaintiff had been damaged in any sum by the withholding of possession of the property.

The cause was tried to the Court and a jury on the 5th day of November, 1920. The defendant Edward S. Curtis appeared in court in person, and by attorney, but neither of them took any part in the trial, excepting that Edward S. Curtis voluntarily offered himself as a witness for plaintiff, and his attorney was called as a witness to identify the signature to plaintiff's Exhibit 14.

Lewis Albert, called as a witness for plaintiff, testified that he was, and for about ten years had been, the office manager of the plaintiff corporation. He identified the signatures of Edward S. Curtis, Robert C. Morris and F. Gordon Brown upon plaintiff's Exhibit 1, which was admitted in evidence. This exhibit is an agreement dated December 21st, 1909, between Edward S. Curtis and the North American Indian, a corporation, in which it is recited that Curtis has for many years theretofore

been engaged in the publication of a work known as The North American Indian, and desires to incorporate said business, and the corporation desires to acquire and henceforth conduct the same, and that in the opinion of the board of directors of the corporation the fair value of the business to the corporation is equal to the sum of $50,000.00, in consideration of one dollar paid by each of the parties to the other, and of the mutual promises therein contained, Curtis "hereby sells, transfers, assigns and sets over unto the copporation the said business heretofore conducted by him in the publication of the said "The North American Indian", and all the property and assets of every name and nature employed in connection therewith, including all copyrights, subscription rights, publications and material for publication, plates, prints and printed books, illustrations and material of every name, including choses in action and rights of action; but subject to all liabilities in respect of such business, which the vendor covenants are fully and truly set forth in the Schedules A, B and C hereunto annexed and forming part of this agreement." In consideration of the issue to him of 590 shares of the preferred stock of the corporation, Curtis agrees to pay into the treasury of the corporation the sum of $59,000.00 in money. The corporation accepts the transfer of said business at the price of $50,000.00, and accepts the subscription of Curtis for 590 shares of the preferred stock of the corporation at par, and in consideration of the transfer of the business, and the

payment of the $59,000.00 in money, the corporation will forthwith issue to Curtis five hundred shares of the common stock of the corporation, and five hundred and ninety shares of the preferred stock; all of the stock to be fully paid and non-assessable. The witness identified the signatures to, and over the objections of plaintiff in error, duly excepted to, plaintiff's Exhibits 2, 3, 4, 5, 6, and 7,—all being assignments of copyrights from Edward S. Curtis to The North American Indian, were admitted in evidence. Over the objection and exception of plaintiff in error there was also admitted in evidence plaintiff's Exhibit 9,—a certified copy of plaintiff's Exhibits 2 and 3; Exhibit 10,—consisting of eleven volumes of the work called North American Indian; Exhibit 11, —consisting of eleven portfolios of plates; Exhibit 12,—the original writ of replevin with the marshal's returns attached; Exhibit 13,—a letter dated Seattle, April 9th, 1920, written by John G. Barnes, as attorney for Clara J. Curtis, to Edward S. Pegram, New York City; Exhibit 14,—letter dated New York, July 7, 1919, written by J. W. Bryan as attorney for Clara J. Curtis, to Edward S. Pegram, New York City. Over the objection and exception of plaintiff in error, plaintiff's Exhibit 15 was admitted in evidence. It consists of two papers—one a notice and tax receipt, and the other a certificate of the Secretary of State of the State of New York that certificate of incorporation of North American Indian was filed in his office on December 18, 1909.

W. Albee, called as a witness for plaintiff, over

the objections and exceptions of plaintiff in error, testified that he had been appointed by His Honor so to do, and had to the best of his ability carried out the order of the Court, and made a check of the various assignments of copyrights shown by plaintiffs Exhibits 1, 2, 3, 4, 5 and 6, and other data, with the negatives at that time in room 64 of the Cobb Building. That he began the work of such checking in the latter part of July, or first part of August, 1920. That in addition to the negatives checked by him there was at the time in said room a "sort of heterogenous mass of material." That it was impossible for him to say how many negatives there were in the room, nor did he know how many he had segregated.

Agnes Shortall, called by the plaintiff testified that she was employed at the Curtis Studio, but not by Mrs. Curtis, for a year and a half, beginning January 1st., 1919. Over the objections and exceptions of plaintiff in error she was permitted to testify that there was in the Curtis Studio while she was there, Indian negatives, baskets, volumes and portfolios, and the common understanding around the studio was that they all belonged to the North American Indian.

B. S. Patten, called as a witness by the plaintiff, testified that he was engaged at the studio at Fourth and University Streets for two years, ceasing his connection on the 6th day of May, 1920. Over the objections and exceptions of plaintiff in error he was permitted to testify that the property of which

the Marshal took possession was generally separated and segregated from the balance of the property in the studio. That it was the common understanding around the studio that it was the property of The North American Indian, the plaintiff in this case. That about three or four weeks before the goods were replevined Mr. Wright, representing the plaintiff, came to the studio and said to Miss Beth Curtis, who was the manager of the studio: "I am representing the North American Indian, and they instructed me to come and get their property." He simply said: "I come up here and want this property. It belongs to the North American Indian." That at that time witness did not know, and no one knew positively, all of the property of the North American Indian. That when Mr. Wright made the demand on Miss Curtis she called the witness and asked him what they should do about it. That the witness told Mr. Wright that so far as he was concerned he could not have the property.

Edward S. Curtis, the defendant, called as a witness on behalf of plaintiff, testified that on the 21st day of December, 1909, he was married to Clara J. Curtis, the other defendant. That at the time plaintiff's Exhibit 1 was executed "the material" was in the Curtis Stuido, in the Downs Block on Second Avenue, in Seattle, King County Washington. That he was a resident of Seattle at that time, and at the time the action was instituted. That he was familiar with the property the marshal seized in this action. That with the exception of a bundle of neg-

atives, about thirty in number, of different members of the Roosevelt family; an old broken mimeograph of practically no value; a box containing a fish net of the value of a couple of dollars; a bundle of burlap of perhaps two or three dollars; a box of old cancelled checks, of no value; some old portrait proofs of no value, and four or five negatives of people not Indians, it is the property of the plaintiff North American Indian. That this was all given from his recollection of some months ago, and that there might be odds and ends of negatives in all those thousands of negatives in room 64 of the Cobb Building which he did not see.

Thereupon the plaintiff rested.

Plaintiff in error introduced in evidence, and read into the record sections 35 and 37 of the general corporation law of the State of New York. Section 35 provides that upon the dissolution of a corporation its directors shall be the trustees of its creditors and stockholders, with full power to settle its affairs, and with authority, by their name as such trustees, to sue for and recover the debts and property of the corporation. Section 37 provides the method by which a domestic corporation may, at any time before the expiration thereof, extend the term of its existence beyond the time specified in its original certificate of incorporation.

Plaintiff in error also introduced in evidence a copy of the original certificate of incorporation of the North American Indian, certified and authenticated under the great seal of state of the state of

New York, by the Secretary of State of the state of New York, from which it appears that the certificate of incorporation of the North American Indian was executed in New York City, New York, by Edward S. Curtis, Robert C. Morris and F. Gordon Brown on the 16th day of December, 1909, was filed and recorded in the office of the Secretary of State of the State of New York on the 18th day of December, 1909, that the principal business office of the corporation is to be located in the Town of Ramapo, (Sterlington Post Office), Rockland County, State of New York, and that its duration is to be ten years.

Plaintiff in error recalled the witness Lewis Albert who testified that on the 18th day of August, 1920, the witness, one Robert I. Alberts and one Joseph S. Clements had executed a certificate of incorporation of The North American Indian, Inc., and caused the same to be filed in the office of the Secretary of State of the State of New York on the 23rd day of August, 1920.

Thereupon plaintiff in error rested her defense.

Whereupon the plaintiff moved the Court:

> "That your Honor direct the jury to return a verdict for the plaintiff in accordance with the demand of the complaint, excepting from the verdict the property that Mr. Curtis has indicated as exceptions that don't belong to the plaintiff; and for the sake of this motion we waive any question of damages."

Thereupon the Court asked the attorney for plaintiff in error if he desired to be heard upon the motion, and Mr. Barnes thereupon argued the motion to the Court. Upon the conclusion of his argument the Court continued the trial of the case until the 9th day of November, 1920.

When the trial was resumed on the last named day, the attorneys for plaintiff, as attorneys for petitioners, filed the petition of E. S. Pegram and Gutson Borglum in which it is set forth that the petitioners "are the sole and only directors and Trustees of The North American Indian, Inc., a corporation, the plaintiff herein, that they ask to be added as plaintiffs herein for the purpose of protecting the property and rights of the plaintiff."

The petition was verified by the affidavit of Elias A. Wright, as one of the attorneys for petitioners.

Thereupon the Court, over the objection and exception of plaintiff in error, granted the petition and signed and entered its order as follows:

> "It is hereby ordered that E. S. Pegram, a resident of the State of New York, and Gutson Borglum, a resident of the State of Connecticut, being the sole directors of the plaintiff herein, are hereby added as plaintiffs in the above action. Done in open court this 9th day of November, 1920. Edward E. Cushman, Judge."

Immediately thereupon Mr. Falknor, one of the attorneys for plaintiffs, addressing the Court said:

> "We will ask the Court to direct the jury to return a verdict as requested."

Thereupon the Court, over the objection and exception of plaintiff in error, read to, and instructed the jury to return its verdict as follows:

UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a corporation,

Plaintiff,

vs.

E. S. PEGRAM and GUTSON BORGLUM,

Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

We, the jury in the above entitled cause, do hereby find that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the marshal, now located in Room 64 Cobb Building, Seattle, Washington, except the following:

No. 1. Mimeograph No Value
No. 2. Three printing-frames Value $5.00
No. 3. Small box containing cancelled checks No Value
No. 4. One box containing portrait proofs No Value
No. 5. One box containing fishnets Value $2.00

No. 6. One box containing burlap.....Value $2.50
No. 7. Twenty-nine large negatives of
Roosevelt family Unknown Value
One small Roosevelt negative
Five negatives of women
One red pocket book, about 150
years old Unknown Value

Being instructed by the Court so to do.

W. D. ALLEN, Foreman."

Upon the verdict being signed by the foreman, and returned to the Court, plaintiff in error objected to the acceptance or filing of the verdict, which was denied by the Court, and she preserved her exception.

Plaintiff in error petitioned the court for a new trial based upon irregularity in, and abuse of discretion by the Court in making the order adding Pegram and Borglum as plaintiffs; irregularity in and abuse of discretion by the Court in granting the motion for, and instructing the jury to bring in the verdict; insufficiency of the evidence to justify the verdict rendered under the instruction of the Court; that the verdict rendered is against law and error in law occuring at the trial and excepted to at the time.

The petition for a new trial was heard on the 20th day of December, 1920, was denied by the Court, to which ruling plaintiff in error preserved her exception, and thereupon the Court signed and entered judgment as follows:

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a Corporation,

Plaintiff.

E. S. PEGRAM and GUTSON BORGLUM,

Additional Plaintiffs.

vs

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

JUDGMENT ON THE VERDICT.

The above-entitled matter having come on regularly for hearing before the Honorable E. E. Cushman, Judge of the above-entitled court, on the 5th day of November, 1920, in the Federal Court Building at Seattle, Washington, in the above-entitled District, before a jury of twelve, good and *qualified chosen* from the District, the plaintiffs appearing with their witnesses and attorneys, Elias A. Wright of the firm of Wright & Wright, and A. J. Falknor of the firm of Poe & Falknor; and the defendant, Edward S. Curtis, appearing in person and by his counsel, W. B. Herr, of the firm of Herr, Bayley & Crosen; and the defendant, Clara J. Curtis, appearing in person with her witnesses and attorney, John G. Barnes; and evidence having been

introduced by the plaintiffs to substantiate their cause of action and the defendant, Clara J. Curtis, in support of her defense thereto—the defendant, Edward S. Curtis, offering no testimony; and at the close of all of the testimony, the plaintiff, The North American Indian, Inc., a corporation, moved the Court for an instructed verdict for all of the property seized by the Marshal, as shown by the writ of replevin herein and the Marshal's return thereon and now located and situated in Room 64 Cobb Building in Seattle, King County, State of Washington, in the District of the United States District Court above entitled; thereafter the Court, on the application of E. S. Pegram and Gutson Borglum, as directors and trustees of the plaintiff corporation, they were added as additional plaintiffs under order of the Court herein jointly with the original plaintiff, and thereafter the Court duly considered—after argument of counsel—the motion of the plaintiffs for an instructed verdict herein, and granted the same, and directed the jury to return a verdict for the plaintiffs for all of the property replevined by the plaintiff and seized by the marshal and now located in Room 64 Cobb Building, Seattle, King County, Washington, in the above-entitled Federal District, save and except certain property as shown by the verdict, the motion of the defendant Clara J. Curtis having been denied and her exception allowed,

NOW, THEREFORE, in pursuance of said motion and directed verdict heretofore duly returned

and filed in this court by direction of this Court, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the plaintiff and seized by the marshal and now located in Room 64, Cobb Building, in Seattle, King County, Washington, in the above-entitled Federal District, save and except the following:

No. 1. Mimeograph No Value
No. 2. Three printing-frames Value $5.00
No. 3. Small box containing cancelled checks No Value
No. 4. One box containing portrait proofs No Value
No. 5. One box containing fishnets Value $2.00
No. 6. One box containing burlap Value $2.50
No. 7. Twenty-nine large negatives of Roosevelt family Unknown Value
One small Roosevelt negative
Five negatives of women
One red pocketbook, about 150 years old Unknown Value

which said excepted property the plaintiffs are hereby ORDERED to return to the Curtis Studio, the place from whence it was seized, or, in the event of their failure so to do, that they pay to the defendants the sum of nine and 50|100 ($9.50) Dollars, the value of said property, and it is further

ORDERED, ADJUDGED and DECREED, the plaintiffs having waived their costs as against the defendants as a condition for the adding of the ad-

ditional plaintiffs, E. S. Pegram and Gutson Borglum, that none of the parties recover costs as against the other herein.

Done in open court this 20th day of December, 1920.

EDWARD E. CUSHMAN,
Judge.

Plaintiff in error gave the defendant Edward S. Curtis notice of her intention to apply for a writ of error, and requested him to join therein, and upon his written refusal so to do, sued out a writ of error. She brings the cause before this Court for a review of the errors of law which she claims were committed by the lower court in denying her motion to quash the writ of replevin, and its execution, in the trial of the action, in the verdict, and in the judgment.

SPECIFICATION OF ERRORS.

I.

That the Court erred in making and entering its order on the 17th day of May, 1920, denying the motion of plaintiff in error to quash and annul the writ of replevin issued in this cause on the 19th day of April, 1920, and to quash and annul the execution of said writ by the Marshal, for the reasons that the Court was without jurisdiction, right or authority to issue said writ of replevin, and the Marshal was without right or authority in executing the same,

such a writ being unknown, and unprovided for, under the laws of the State of Washington.

II.

The Court erred in denying the objection of the plaintiff in error to the admission in evidence of plaintiff's Exhibit 15, and in admitting said exhibit in evidence. The full substance of plaintiff's Exhibit 15 is that it consists of (1) A purported notice of assessment and receipt from the state tax department, Albany, New York, dated the 18th day of November, 1919, notifying North American Indian, Inc. 437 5th Ave., New York City, that there had been assessed against it an estate franchise tax for period ending October 31, 1920, one mill on cap. stk., amounting to the sum of $110.00, due and payable on or before January first, 1920, stamped: "Jan. 9-20 Received payment. Eugene M. Travis Comptroller," and (2) A certificate of the Secretary of State of the State of New York, under the office seal, certifying that the certificate of incorporation of the North American Indian, with acknowledgment thereto annexed, was filed and recorded in his office on the 18th day of December, 1909.

III.

The Court erred in granting the petition of E. S. Pegram and Gutson Borglum that they be added as plaintiffs in the action; and in making and entering its order adding said E. S. Pegram and Gutson Borglum as plaintiffs in action, for the reasons:

1. Said petition was filed, and said order made, after both the plaintiff in the action, and plaintiff in error, had each closed its, and her, case to the jury, and after the plaintiff in the case had moved the court to "direct the jury to return a verdict for the plaintiff in accordance with the demand of the complaint, excepting from the verdict the property that Mr. Curtis has indicated as exceptions that don't belong to the plaintiff."

IV.

That the Court erred in granting the motion of plaintiff, and additional plaintiffs, "to direct the jury to return a verdict as requested," and in directing the jury to return the verdict which the Court instructed it to return, and which, in accordance with such instruction, it did return in the case, for the reasons:

1. No amendment of the complaint in the action was sought, granted or made, after the entry of the order adding the additional plaintiffs.

2. No reopening of the case was sought, granted or had by the plaintiff, or additional plaintiffs, or either of them, and said verdict was instructed to be returned solely upon the evidence introduced by plaintiff, and plaintiff in error, and after each of them had closed their case to the jury.

V.

That the Court erred in instructing the jury to render, and in receiving and accepting the verdict

returned by the jury in accordance with such instruction and direction; and the verdict so directed, returned and received, is against law and the evidence in the case is insufficient to justify said verdict, for the following reasons:

1. No evidence whatsoever was offered, or introduced in the case as to the citizenship of either of the additional plaintiffs E. S. Pegram, or Gutson Borglum.

2. No evidence whatsoever was offered or introduced in the case that either of said additional plaintiffs had any right, title, or interest of any kind whatsoever, or right to possession, of any property whatsoever, or at all, either that mentioned in the complaint, or in that "replevined by the marshal, now located in room 64 Cobb Building, Seattle, Washington," as in the verdict.

3. Said verdict does not find the jurisdiction fact put in issue by the complaint and answer of the plaintiff in error thereto, that at the time of the commencement of the action the plaintiff in the case was a corporation existing under and by virtue of the laws of the State of New York, or that it had any existence whatsoever, or at all, whereas, the evidence introduced by the plaintiff in error was conclusive, undisputed and admitted, that by reason of the expiration of the time limit fixed in its certificate of incorporation for the duration of its existence, the plaintiff corporation in the case had ceased to exist on the 18th day of December, 1919—four months before the action was commenced.

4. That said verdict is wholly insufficient to support any judgment whatsoever, and is fatally defective, in that it does not refer to, nor describe, the property, or any of it, mentioned, referred to, or set out in the complaint in the action.

5. That said verdict is wholly insufficient, and is fatally defective in that it does not determine either the ownership of, or right to possession of, all, or any part, of the property referred to, or set out in the complaint, and as to which issue was joined by the answer thereto of plaintiff in error.

6. That said verdict is fatally defective, and wholly insufficient to support any judgment whatsoever in that it does not determine the gist of the action issue made by the complaint and each of the answers of plaintiff in error and defendant Edward S. Curtis, of the alleged wrongful and unlawful detention by plaintiff in error, or defendant Edward S. Curtis, or either of them, of the property referred to, or set out, in the complaint, or of any property whatsoever, or at all.

7. That said verdict is fatally defective, and wholly insufficient to support any judgment in that it does not determine the issue raised by the complaint and the answer thereto of plaintiff in error, of the possession by plaintiff in error at any time, or at all, of any of the property referred to, or set out, in the complaint.

8. That said verdict is wholly insufficient and fatally defective in that it does not find the value

of the property referred to, or set out, in the complaint, or of the property referred to in said verdict, or of any other property save only certain other property which said verdict finds the plaintiffs are not the owners, nor entitled to the possession, and which property is not referred to, described nor set out in the complaint.

VI.

The Court erred in taking from the jury the right to pass upon the following jurisdictional issues of fact, raised by the complaint and the answer thereto of plaintiff in error, and by the answer of defendant Edward S. Curtis:

1. The issue of fact as to whether or not the plaintiff, The North American Indian, Inc., was at the time of the commencement of the action a corporation organized and existing under and by virtue of the laws of the State of New York. Plaintiff in error introduced in evidence Defendant's Exhibit A which is an exemplified certified copy of the certificate of incorporation of The North American Indian, certified to be such by the Secretary of State of the State of New York, under the office, and great seal of the State of New York, which shows that the certificate of incorporation of said corporation was filed in the office of the Secretary of State of the State of New York on the 18th day of December, 1919; that it is provided in such certificate of incorporation that the duration of the existence of said corporation shall be ten years.

Plaintiff in error also introduced in evidence two sections of the laws of the State of New York, one providing the manner in which the term of the existence of a corporation could be extended beyond the time specified in its original certificate of incorporation, and the other providing that upon the dissolution of a corporation its directors at the time of such dissolution shall be the trustees of its creditors and stockholders, with full power to settle its affairs, with authority, by their name as such trustees, to sue for and recover the debts and property of the dissolved corporation. No evidence whatsoever was offered by plaintiff in the case in rebuttal of the evidence so introduced by plaintiff in error.

2. The value of the property referred to, or set out, in the complaint. Upon this issue there was no evidence whatsoever.

VII.

The Court erred in denying the motion of the plaintiff in error for a new trial upon the grounds:

1. Insufficiency of the evidence to justify the verdict rendered under the instructions of the court.

2. That the verdict is against law.

3. Error in law occurring at the trial and excepted to at the time by plaintiff in error.

VIII.

The Court erred in making and entering the judgment made and entered in the case:

1. Because there is no verdict sufficient in law to support said judgment, or any judgment.

2. Because said judgment does not conform to the verdict in the case in that it is therein adjudged "that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the plaintiff," whereas the verdict is "that the plaintiffs are the owners of, and entitled to the possession of all the property replevined by the marshal."

3. Because the verdict did not find, and the court was without jurisdiction to adjudge that plaintiffs return to the Curtis Studio the property described in the judgment as not belonging to plaintiffs, or that in the event of their failure so to do, they pay the defendants the sum of Nine and 50/100 Dollars, the value of said property.

ARGUMENT AND AUTHORITIES

I.

Error in Denying Motions of Plaintiff in Error to Quash Writ of Replevin and its Execution by the Marshal.

It may be asserted with confidence that the writ of replevin (Record p. 20) issued in this case is the only one of its kind ever issued in either the Territory, or State of Washington. The first session of the Territorial legislature was held in 1854, and it

enacted the "claim and delivery" statute applicable to justice of the peace courts, and the legislature of the Territory in 1869 passed the act providing for like proceedings in the District Courts of that time, of which the present Superior Courts of the State of Washington are the successors. Neither of these statutes have been changed in the slightest degree, and they stand, and have always stood, as originally enacted. The statute applicable to the case at bar is contained in sections 707-717 of Remington's Code of Washington, those pertinent herein being as follows:

> 707. The plaintiff in an action to recover the posession of personal property may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as herein provided.
>
> 708. When a delivery is claimed an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:
>
> 1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;
>
> 2. That the property is wrongfully detained by the defendant;
>
> 3. That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the

plaintiff, or if so seized, that it is by law exempt from such seizure; and

4. The actual value of the property.

709. Upon the receipt of the affidavit, and a bond to the defendant, executed by one or more sufficient sureties, approved by the sherriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit and bond by delivering the same to him personally, if he can be found, or his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the postoffice, directed to the defendant, at the postoffice nearest his place of residence.

710. The defendant may, within three days after the service of a copy of the affidavit and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties: if he fail to do so he shall be deemed to have waived all objections to them. When the defendant excepts the sureties shall justify on notice in like manner as bail on arrest, and the sheriff shall be responsible for the sufficiency of the sureties

until the objections to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties he cannot reclaim the property as provided in the next section.

711. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a bond, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 716.

712. The defendant's sureties, upon a notice to the plaintiff or his attorney of not less than two nor more than six days, shall justify in the same manner as bail upon arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

713. The qualification of sureties and their justification shall be as prescribed in respect to bail upon an order of arrest.

715. When the sheriff shall have taken the property as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

717. The sheriff shall file the affidavit, with the proceedings thereon with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein.

In *Scott vs. McGraw,* 3 Wash. 678, the court says:

"In this state we have no common law action of replevin. That action has been abrogated, and the statutory action commonly called "claim and delivery" under the codes of the various states, has been substituted in its stead."

R. S. section 914, requires that in this action the District Court should conform to the practice, pleadings, forms and mode of proceeding in a like cause in a Superior Court of the State of Washington, any rule of court to the contrary notwithstanding. It is evident, therefore, that the District Court was in error when it made an order directing the issuance of a writ of replevin (Record p. 19), and was again in error in reciting therein that it finds "from the plaintiff's complaint herein on file and the affi-

davit in support thereof that the cause of action for replevin is stated therein."

As in Washington, so in Virginia, the action of replevin had been abrogated. In Baltimore & O. R. Co., vs. Hamilton, 16 Fed. Rep. 181, in an action commenced in Virginia claiming the possession of chattels alleged to be wrongfully withheld, the plaintiff caused a writ of replevin to issue out of the United States Circuit Court, and the property seized thereunder by the Marshal, precisely as was done in the case at bar. The defendant moved to quash the writ of replevin, and in its decision on the motion the Court, after referring to the provisions of R. S. section 914, says:

> "Now, on a like case, that is, in a case where a person is complained of for taking possession of and holding the chattels of another wrongfully, the courts of Virginia are not permitted to give the writ of replevin to a plaintiff to remedy his wrong; and as we must follow their form and mode of proceeding in such a case, we are not at liberty to issue that writ, but must follow the state's form and mode, whatever they may be. * * * The motion to quash is granted."

In the case at bar the plaintiff entirely ignored the "form and mode of proceeding" provided by the statute of Washington for claiming the immediate possession of the property which it alleged plaintiff in error was wrongfully withholding from it. Instead of delivering the affidavit and bond to the

Marshal they were filed with the clerk of the court, at the same time as the complaint, and neither of them were ever in the hands of the Marshal. Instead of the bond being delivered to the Marshal, and approved by him, it was presented to the Judge, and by him approved. (Record p. 19) This he was wholly without authority to do, and because the writ of replevin was wholly unauthorized, and therefore void upon its face, the bond given to procure it was likewise void, and no liability attached thereto notwithstanding all of the parties might have treated all the proceedings as regular.

Hicks vs. Mendenhall, 17 Minn. 475.
Rosen vs. Fischell, 44 Conn. 371.

In construing a statute the counterpart of section 709, excepting that in California the plaintiff is required to indorse an order for taking the property upon the affidavit before delivering it to the sheriff, in *Laughlin* vs *Thompson,* 76 Cal. 287, 290, 18 Pac. 330, the Court says:

> "In case of "claim and delivery" the affidavit, order indorsed thereon, and undertaking all go into the hands of the officer, and constitute the process. He must determine whether they are regular and sufficient."

In sections 678 and 679 of his work on the law of replevin Mr. Cobbey says:

> "Where the statute makes the sheriff the judge of the bond, the court will not interfere with the exercise of his discretion. The officer is the exclusive judge of the sufficiency of the

> bond in the first instance. He can require just such a bond as the statutes provide for, and none other, but he is the sole judge of the bond, and is responsible on his official bond if he fail in his duty to either party. He is also responsible for the bond being in the statutory form, and for its being executed in the statutory manner."

One illustration among many which might be given, will suffice to show why this must be so. Under section 710 plaintiff in error had three days after the service upon her of a copy of the affidavit and bond, within which she might give a notice to the marhsal that she excepted to the sufficiency of the sureties upon the bond. During that three day period the marshal was "responsible for the sufficiency" of the sureties, and, had the notice of exception been given, the responsibility of the Marshal would have continued until justification or the substitution and justification, of new sureties. The Court, on the other hand, was under no responsibility at any time, or at all. By its act it had deprived her of her statutory right, and had caused her property to be taken without due process of law.

II.

Error in Admitting Plaintiff's Exhibit 15 in Evidence.

Plaintiff in error having specifically denied the allegation of the complaint that the plaintiff therein was a corporation organized and existing under

and by virtue of the laws of the State of New York, the burden was upon it of proving both its corporate organization, and existence as alleged. The state where organized, because that determined its citizenship, and its existence, because upon that depended its capacity to wage the action.

Roberts vs. Lewis, 144 U. S. 653, 36 L. Ed. 579.

W. L. Wells Co. vs. *Gastonia Cotton Mfg. Co.,* 198 U. S. 177, 49 L. Ed. 1003.

Lindsay-Britton Live Stock Co. vs. *Justice,* 191 Fed. 163.

Failure to prove that allegation ended the authority of the court to proceed with the trial.

The proper method of proving the organization and existence of the plaintiff corporation was to introduce the act of the state of New York by or under which it was created, or organized, and then to introduce the certificate of incorporation, or a copy thereof, authenticated in the mode prescribed by R. S. section 906.

Owen vs. Shepard, 59 Fed. 746.

As to its organization it offered no proof whatsoever. The only evidence it offered as to its existence was plaintiff's Exhibit 15, (Record p. 119) which was admitted over the objection and exception of plaintiff in error. (Record pp. 67, 68)

The exhibit consists of two separate and distinct papers, held together by a wire clip. One of the pa-

pers is dated Nov. 18, 1919, and purports to be a notice by the state tax department, Albany N. Y., of a tax of one mill on capital stock of North American Indian Inc., for period ending October 31, 1920, due and payable on or before January 1, 1920, and rubber stamped receipt of payment on Jan. 9, 1920, by Comptroller. The other paper is a certificate of the Secretary of State of the state of New York, under his office seal, that the certificate of incorporation of the North American Indian, with acknowledgment thereto annexed, was filed and recorded in his office on the 18th day of December, 1909.

As to the assessment notice and receipt I submit that it is quite sufficient to say that when the notice was sent the corporation was still alive, its existence not having ended by reason of the expiration of the duration thereof fixed in its certificate of incorporation, until the 16th day of December, 1919, and that payment, or receipt, of the tax subsequent to the dissolution, would in no wise prove, or tend to prove, an extension of the life of the dead corporation. And this even though the paper had been authenticated, or identified in any way, which it was not.

Mc Donald vs. *New World Ins. Co.,* 76 Wash. 488-490.

Koloff vs. C. M. & St. P. R. R. Co., 71 Wash. 543, 553.

The witness Albert, who testified that he was the office manager of the plaintiff corporation, and who,

as such presumably paid the tax, was not asked either to identify the paper, swear to its genuineness, or to the fact of payment of the tax.

The certificate of the Secretary of State was clearly inadmissable in evidence. There is no provision anywhere, either in the laws of the United States, or of the State of Washington, which sanctions its admission. R. S. section 906 which provides that an exemplified certified copy of the certificate of incorporation of the plaintiff corporation, under the great seal of state of the State of New York, would be admitted in evidence, and "should have such faith and credit given to it" by the trial court as it had by law, or usage, given it in the courts of the state of New York, governs, and should have been followed.

Whitford vs. Clark Co., 119 U. S. 522, 30 L. Ed. 500.

But no such copy of the certificate of incorporation of the North American Indian was ever offered in evidence. The reason why is patent upon the record. Even the certificate of filing which was offered and received, was inadmissable for want of proper authentication, if for no other reason.

Milwaukee Gold etc. Co., vs. Gordon, 37 Mont . 209, 95 Pac. 995.

III.

Error in Adding Pegram and Borglum as Plaintiffs.

The purpose of adding Pegram and Borglum as plaintiffs in the action is stated in their petition to be that "of protecting the property and rights of the plaintiff herein." (Record p. 31) Their petition was filed after both parties litigant had rested the case, four days after the attorney for plaintiff in error—upon whom the Court had thrust the laboring oar—had submitted his argument against the granting of the motion of the plaintiff for an instructed verdict. (Record p. 75)

The essence of that argument was: That the plaintiff in error having introduced indisputable proof of the fact that more than four months before the action was commenced in its name, the plaintiff corporation had ceased to exist by reason of the expiration of the time fixed in its certificate of incorporation for the duration of its life, it was the duty of the Court to abate the action in accordance with the provisions of section 37 of the Judicial Code, for the reasons:

1. The time limited in the certificate of incorporation of the plaintiff corporation having expired on the 16th day of December, 1919, *ipso facto* its extinction was complete without any judicial determination of that fact, and it was both *de jure* and *de facto* dead.

Pendleton vs. Russell, 144 U. S. 640, 36 L. Ed. 574.

Crossman vs. Vivienda Water Co., 150 Cal

Sturges vs. Vanderbilt, 73 N. Y. 384, 390.

Marion Phosphate Co. vs. Perry, 74 Fed. 575, 89 Pac. 335.

425.

That even if it continued to exercise without authority its corporate powers after such dissolution it did not thereby become a *de facto* corporation in so far as it might assert rights and powers as a corporation:

Clark vs. Am. Cannel Coal Co., 165 Ind. 213, 73 N. E. 1085.

Bradley vs. Reppell, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841.

2. That under section 35 of the general corporation law of New York, (Record, pp. 70, 71), the domicile of the former corporation, as well as under section 3707 of Remington's Code of Washington, the law of the forum, upon the extinction of the corporation the title to all its property vested in the then directors as trustees for the creditors and stockholders of the defunct corporation

Bank vs. Walker, 66 N. Y. 424.

People vs. O'Brien, 111 N. Y. 1, 18 N. E. 692.

Aalwyns Law Institute vs. Martin, 173 Cal 21, 159 Pac. 158.

That those trustees, and they only, in their name as such, could commence, or maintain, an action to recover the possession of the property of the dead corporation.

Crossman vs. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335.

Paola Town Co. vs. Krutz, 22 Kan. 725.

Root vs. Wear, 98 Kan. 234, 157 Pac. 1181.

Consolidated Asso. of Planters vs. Mason, 24 La. Ann. 518.

McCoy vs. Farmer, 65 Mo. 244.

Sturges vs. Vanderbilt, 73 N. Y. 384.

Marstaller vs. Mills, 143 N. Y. 398, 38 N. E. 370.

Creus vs. Farmer's Bank, 31 Gratt. (72 Va.) 348.

3. That any judgment which the court might render, either in favor of, or against the plaintiff corporation, would be an absolute nullity.

Mumma vs. Patomac Co., 8 Pet. 281, 287, 8 L. Ed. 945.

Hardman vs. Sage, 124 N. Y. 25, 34, 26 N. E. 354.

May vs. State Bank, 2 Rob. (Va.) 56.

Hawley vs. Queen Mining Co., 61 Wash. 90.

Droppleman vs. Illinois Surety Co., 95 Wash. 476.

Peck vs. Linney, 97 Wash. 103, 114.

Upon the conclusion of the argument upon plain-

tiff's motion for an instructed verdict, the Court, without deciding it, continued the trial for four days. (Record p. 75) Upon the resumption of the trial plaintiff's attorneys filed the petition of Pegram and Borglum. In presenting it to the Court they said: (Record p. 75)

> "If the Court please we are submitting at this time a petition to add as plaintiffs the existing trustees, Mr. Pegram and Mr. Borglum, one in the state of New York, and the other in the state of Connecticut. We have asked to add, not substitute, because I don't think substitution is necessary. We are asking that these two trustees be associated in this case at this time."

Thereupon, over the objection and exception of plaintiff in error, (Record pp. 76-78) the Court made and entered the order adding the two persons named "as plaintiffs in the above action."

The persons who by their will, created the corporation North American Indian, in the very act of its creation numbered the years of its existence. With the passing of those years its life ceased. Months after its death an attorney claiming to represent the extinct corporation, appeared before the manager of the Curtis Studio and said: "I come up here and want this property. It belongs to the North American Indian." There is no evidence as to what the manager said, but two or three weeks later the attorney filed in the District Court a complaint, verified by him, in which the dead corporation is plaintiff, in

which it is alleged that defendants were unlawfully detaining the property of plaintiff, and demanding its possession. The same attorney swore to an affidavit averring positively that the property was the property of the plaintiff corporation, and that defendants were unlawfully withholding it from the corporation. In the name of the corporation he executed a bond, caused a writ of replevin to issue, and the Marshal to seize, not only the property described in the complaint, but a large amount of property in addition to such described property. On the trial the only purport of the evidence submitted on the part of plaintiff was to show that the plaintiff was an existing corporation, owner of, and entitled to the possession of the property taken by the Marshal—not that described in the complaint. There was absolutely no evidence that Pegram and Borglum had any interest in, or were in any manner connected with the property, the demand, or the institution of the action. Confronted in court with proof of the indisputable fact that they had no client; that everything that had been done in the name of the dead corporation—demand, complaint, affidavit, bond, seizure—was an absolute nullity, the attorneys beseeched the Court to *nunc pro tunc* re-create and vitalize the dissolved nothing which had borne the corporate name, by its fiat of "associating" with the name of the dead corporation the names of two live strangers, and that by that act the Court would validate all that which had been void.

Incomprehensible as it is, the Court did that thing. It is self-evident that if the corporation was still in existence then its sole directors Pegram and Borglum, if such they were, could not join with it in the action, for they neither personally, nor as directors, had suffered any injury. If the corporation was dead then the title to its property passed to its former directors who became trustees, not for the corporation, for that was dead, but for its creditors and stockholders, and in their name, as such trustees, they must make the demand, and must be plaintiff in the action.

Miami Exporting Co. vs. Gano, 13 Ohio 270.

After Pegram and Borglum had been added as plaintiffs no leave to amend the complaint was asked, no further evidence was introduced. In *Oldfield vs. Angeles Brewing and Malting Co.,* 72 Wash. 168, the Court says:

> "No leave to amend was requested. No rule of construction, however liveral, can permit the trial of an issue not tendered in the complaint, over the objection of the defendant. To permit such a course would be to ignore the statute, dispense with formal pleadings, and invite endless confusion."

If such is the rule where there was evidence, what is to be said when there was no evidence whatsoever as to Pegram and Borglum.

That Pegram and Borglum could not have been substituted as plaintiffs is too well settled for argument. There is no such thing as a vicarious right of

action to recover property wrongfully detained, where its immediate delivery has been claimed.

Liebman vs. McGraw, 3 Wash. 520.

Bardwell vs. Stubbert, 17 Neb. 485, 23 N. W. 344.

Flanders vs. Lyon, 51 Neb. 102, 70 N. W. 524.

Meyer vs. Omaha Furniture Co., 76 Neb. 405, 107 N. W. 767.

Anderson vs. Stewart, 108 Md. 340, 70 Atl. 228, 232.

McRae vs. Kansas City Piano Co., 69 Kan. 457, 77 Pac. 94.

Wilde vs. Paschen, 67 Wis. 90, 30 N. W. 279.

IV.

Error in Granting the Motion for a Directed Verdict.

Immediately upon the signing of the order adding Pegram and Borglum as plaintiffs, (Record p. 77) counsel for plaintiffs moved the Court to direct a verdict "as requested," whereupon the Court granted the motion and instructed the jury to return the verdict it did, to all of which plaintiff in error, in accordance with rule 60 of the District Court, preserved an exception. (Record p. 80).

Under the repeated decisions of the Supreme Court of Washington, which are binding upon the District Court, the power of the trial court to direct a verdict is to be exercised only when the court can

say, as a matter of law, that there is neither evidence, nor reasonable inference from evidence, sufficient to sustain any other verdict, or judgment. Such a motion invokes no element of discretion, but calls for the exercise of a pure judicial function."

Brown vs. Walla Walla, 76 Wash. 670.
Forsyth vs. Dow, 81 Wash. 137.
Paich vs. Northern Pacific, etc., 82 Wash. 581.
Fobes Supply Co. vs. Kendrick, 88 Wash. 284.
Washington Trust Co. vs. Keyes, 88 Wash. 287.

Applying the rule to the case at bar, it is obvious that the Court erred in granting the motion. As to the additional plaintiffs there were no pleadings, and no evidence, therefore, under no circumstances could the Court be warranted in granting the motion as to them. As to the plaintiff corporation, not only had it failed to prove the truth of a single one of the material allegations of its complaint, but there was proof conclusive that its jurisdictional allegation of existence was not true. Not only had it failed to offer any proof of the gist-of-the-action allegation of wrongful detention by plaintiff in error, but, on the contrary, had itself offered the evidence showing that she was not in possession. (Testimony of witness Patten, Record p. 63, and Record pp. 114-15, Plaintiff's Exhibit 13, letter dated April 9, 1920, wherein it is stated that in the divorce decree Mrs. Curtis had been awarded the Curtis Studio, that Mr. Curtis had appealed to the Supreme Court from that part of the decree awarding her the Stu-

dio, that the Supreme Court had just affirmed the award, and that "Mrs. Curtis expects to be able to take possession of the Curtis Studio in about thirty days.")

V.

Error in Instructing the Jury to Return the Verdict, and in the Verdict.

Section 362 of Remington's Code of Washington provides:

> "The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court."

There can be no dispute but that under this law the verdict in this case (Record p. 34) is a special verdict. Its findings are limited to two facts only, viz: ownership and right of possession.

Hickey vs. Breen, 40 Mont. 368, 106 Pac. 881.

In Vol. 23 R. C. L. p. 936, section 108, it is said:

> "In action of replevin, or claim and delivery, the usual rule applies that the verdict is bad if it varies from the issues in a substantial matter, or if it finds only a part of that which is in issue. Whether the jury find a general, or a special verdict it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a

> general finding so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered on the verdict. A general verdict for the plaintiff in replevin is a finding in his favor on all the issues of fact made by the pleadings, and therefore includes a finding of an unlawful taking, or detention, but a special verdict in favor of the plaintiff is defective where the issues include an unlawful taking, or detention, and the verdict is silent as to whether there was an unlawful taking or detention."

Moreover, the rule is well established that the failure of a jury to find affirmatively and specifically on a matter alleged in a pleading, and in issue, in a special verdict, is equivalent to a finding against such allegation, being the same as a finding against the party who has the burden of proof on that issue.

> *Dennis vs. Louisville, etc., R. Co.,* 116 Ind. 42, 18 N. E. 179.
>
> *Bates vs. Chicago, etc., R. Co.,* 140 Wis. 235, 122 N. W. 745.

The verdict herein is silent upon every issue of facts made by the pleadings, and speaks only of facts upon which there was no issue. There was no issue raised by the pleadings upon the question of ownership by, or right to possession of, "the plaintiffs." There was no issue in the pleadings upon either the ownership or right to possession, of anybody, of "all the property replevined by the mar-

shal, now located in Room 64 Cobb Bldg., Seattle, Washington, except the following," etc. It is not surprising that the verdict should be silent upon every issue made by the pleadings, for either there was no proof at all, or the proof introduced refuted every material allegation of the complaint put in issue by the answer of the plaintiff in error. To illustrate: From the beginning to the end of the trial the property described in the complaint was not mentioned in the evidence. The evidence was all confined to the property which the marshal took, and which was at the time of the trial in room 64 of the Cobb Building.

Outside of jurisdiction, the vital issue in the case was that of the alleged, and denied, unlawful detention by plaintiff in error of the property described in the complaint. In *Dow vs. Dempsey,* 21 Wash. 86, 95, the Court says:

> "The primary object of the action of claim and delivery under the code, is to recover the possession of personal property in specie, and the gist of the action is the wrongful detention of the property by the defendant. In such an action it is necessary for the complainant in order to state a cause of action, to allege that the property, recovery of which is sought, is wrongfully detained by the defendant. And the failure to prove the allegation must of necessity be a fatal variance."
>
> *Fries vs. Lockwood,* 64 Wash. 221, 223.

As has been heretofore shown, not only was there entire lack of proof of possession by plaintiff in

error, but the attorneys for the alleged plaintiff furnished the evidence that she was not in possession. Indeed, the sign boards along the way traveled by this action are painted in letters so large that even the speeding joy-rider might read, that the sole object of the action was to prevent plaintiff in error from coming into possession of the property—the very thing which the complaint alleges she had. To mention but two of these, let me refer to the significant fact that although the statute (Sec. 709) authorized the taking of property by the officer only "if it be in the possession of the defendant, or his agent," and the writ of replevin directed the marshal to take only "from the defendants," both the first, and supplemental, return of the marshal are silent as to from whom he took. The evidence is (Record pp. 63, 64) that a person other than either of the defendants was in possession of the property which the marshal took. Mr. Pomeroy in his work on Code Remedies, section 297, says:

> "The common-law rules as to parties defendant in an action to recover possession of chattels have not been in any manner affected by the new procedure. Such actions must be brought against the party or parties in actual possession of the chattel demanded by the plaintiff. If this actual possession is in one, he must be the sole defendant, if in two or more jointly,—as, for example, in a partnership,—they must all be made defendants."

Seattle Natl. Bank vs. Meerwaldt, 8 Wash. 630.

Even if the verdict in this case had been a general one in favor of the plaintiffs it would still be so fatally defective and insufficient that it would not support a judgment.

1. The law is that the verdict must describe the property with such definiteness and certainty that it may be clearly identified.

Lehman vs. Myer, 74 N. Y. S. 194.
Guille vs. Fook, 13 Ore. 577, 11 Pac. 277.
Bossard vs. Vaughn, 68 S. C. 96, 49 S. E. 523.
Eason vs. Miller, 18 S. C. 381.
Harris vs. Anstill, 2 Baxt. (Tenn.) 148.
Stevens vs. Osman, 1 Mich. 92.

And, of course, the description must agree with that in the complaint.

Wolfe vs. Blue, 5 Blackf. (Ind.) 153.

If the property is specifically described in the complaint, the description in the verdict may be made certain by reference to the complaint, but if the description in the complaint is insufficient, a verdict which refers only to the property described therein is fatally defective.

Pierce vs. Langdon, 3 Idaho 141, 28 Pac. 401.
Richardson vs. McCormick, 47 Iowa 80.
Guille vs. Fook, 13 Ore. 577, 11 Pac. 277.

The verdict herein (Record p. 34) makes no reference to the property described in the complaint. It reads: "all of the property replevined by the marshal." Webster's International Dictionary de-

fines one of the meanings of the word "replevied" to be: "C. To seize under a writ of replevin—said of a sheriff or bailiff."

The marshal's return on the writ of replevin (Record p. 22) shows that he took under the writ a large amount of property not mentioned, or described, in the complaint, to-wit:

> "Assortment of Negative and Positive Plates 6 1-2 x 8 1-2 Size Indian Subjects, numbering from 1 to 38,000, as listed in Four Record Books of Corresponding Numbers; 729 Negative and Positive Plates 14x17; 51 Negative and Positive Plates 18x22; 19 Negative and Positive Plates 16x20; 16 Large Bound Portfolios; 19 Volumes of "North American Indian" 3-4 Morocco; 6 Volumes of "North American Indian" in Cloth; 1 Package of Folio Prints; 1 Small Package of Prints; Assorted Portfolio Prints Unbound and 1 Volume of Indian Days of Long Ago—In Cloth."

The marshal's return also shows that he did not take under the writ four items of property set out in the complaint, to-wit:

Indian Saddle, Phonograph, Tripod and Large Assortment of Indian Blankets.

In *Patterson vs. U. S.*, 2 Wheat. 221, 4 L. Ed. 224, it is said that a special verdict in order to support a valid judgment must be responsive to the issues raised. It should be the end, and not the basis for the continuance of the same controversy. If it varies from the issues in a substantial manner, or

finds only part of that which was in issue, it is a nullity, and does not in itself affect the rights of either party. The court can draw no conclusions of law therefrom, nor render a judgment thereon.

In harmony with the rules thus laid down it has been held that in a case of this kind a verdict finding the plaintiff entitled to a part of the property in issue, and silent as to the rest, is fatally defective, although the omitted property has not been taken from the possession of defendant, and his answer does not ask for return.

Carrier vs. Carrier, 71 Wis. 111, 36 N. W. 626.

Feder vs. Daniels, 79 Wis. 578, 48 N. W. 799.

And this is so even if the right to possession of but one article is undetermined by the verdict.

Young vs. Lego, 38 Wis. 206.

Maxon vs. Penott, 17 Mich. 332.

The verdict restricts the ownership and right to possession of the property taken by the marshal to that "now located in Room 64 Cobb Building, Seattle, Washington," i. e., to that property on the 9th day of November, 1920, in said room, and, as if there was not already enough "confusion worse confounded" it excepts from the property taken by the marshal, then in room 64 of the Cobb Building, ten certain items of property. Now, these ten excepted items are not mentioned, or described, in either the complaint or the marshal's return. Edward S. Curtis testified (Record p. 69) that eight of the ten

excepted items did not belong to the North American Indian, but as to the other two items, to-wit: "No. 2. Three printing-frames, value $5.00; One red pocketbook, about 150 years old, Unknown value," there is no reference to them in the case.

2. The verdict is fatally defective in that it does not find the value of the property referred to therein.

Section 363 of Remington's Code of Washington provides:

> "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, * * * the jury shall assess the value of the property if their verdict be in favor of the plaintiff."

Of a surety the property which the marshal took in this case had not been delivered to the plaintiff, because the plaintiff did not exist. The marshal's returns state (Record pp. 21 and 23) that he stored the property in "No. 64 Cobb Bldg., in charge of George W. Slade." That it was still in the possession of the marshal, at said place, at the time of the trial is indicated by the questions of counsel for plaintiff as shown on pages 47 to 60 of the record.

The verdict was not in compliance with the mandatory provisions of the statute, and therefore illegal.

Meeker vs. Johnson, 3 Wash. 247, 254.

Quinn vs. Parke & Lacy M. Co., 5 Wash. 276.

VI.

Error in Taking From Jury Right to Pass Upon the Jurisdictional Issues of Fact.

Considered independently of the other questions in the case, I submit that the Court erred in taking from the jury the right to pass upon the jurisdictional issue of the diversity of citizenship and existence of the plaintiff corporation. As has been hereinbefore stated, my contention was, and is, that the Court should have abated the action under section 37 of the Judicial Code. Having declined to do that, I think it is clear that it should have submitted the issue to the jury, under a proper instruction.

Gilbert vs. David, 235 U. S. 568, 59 L. Ed. 363.

Roberts vs. Lewis, 144 U. S. 653, 36 L. Ed. 579.

Lindsay-Britton Livestock Co. vs. Justice, 191 Fed. 163.

VII.

Error in Denying the Motion for a New Trial.

Plaintiff in error filed and presented to the Court her motion for a new trial, based upon the same grounds as those of her assignment of errors herein. (Record p. 82). The Court denied the motion (Record p. 88) and error is assigned thereon. Inas-

much as the matters presented to the Court by the motion for a new trial are the same as those presented in this brief, excepting questions relating to the judgment, it is unnecessary to repeat them..

VIII.

Error in the Judgment.

The judgment entered (Record p. 36) is void.

1. The North American Indian, Inc., having been dissolved long before the demand for possession, or commencement of the action, the joint judgment in its favor is an absolute nullity.

Pendleton vs. Russell, 144 U. S. 640, 36 L. Ed. 574.

McCulloch vs. Norwood, 58 N. Y. 562.

Sturges vs. Vanderbilt, 73 N. Y. 384.

Thorton vs. Marginal Freight Co., 123 Mass. 32.

Dobson vs. Simonton, 86 N. C. 492.

Newhall vs. Western Zinc Min. Co., 164 Cal. 380, 128 Pac. 1046.

Ins. Comm. vs. U. S. Fire Ins. Co., 22 R. I. 377.

Ingraham vs. Terry, 11 Humph. (Tenn.) 572.

Hawley vs. Queen Min. Co., 61 Wash. 90.

Droppleman vs. Illinois Surety Co., 95 Wash. 476.

Peck vs. Linney, 97 Wash. 103, 114.

2. The law is that in actions of this kind a joint judgment can only be entered for parties who have

a community of interest in the property in question.

Sweetzer vs. Mead, 5 Mich. 107.

Steele vs. Matteson, 50 Mich. 313, 15 N. W. 488.

Bardwell vs. Stubbert, 17 Neb. 485, 23 N. W. 344.

Palmer vs. Meiners, 17 Kan. 478.

Page vs. Fowler, 39 Cal. 412.

It is too plain for argument that this judgment that "the plaintiffs," i. e., the dead corporation and Pegram and Borglum, are jointly the owners of and entitled to the possession of all the property, cannot stand. The power to hold property ended with the life of the corporation.

3. Section 434 Remington's Code of Washington provides:

> "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention."

The only judgment that could be entered is one in conformity with the statute. Any other is unauthorized.

Edison vs. Woolery, 10 Wash. 225, 227.

National Bank vs. Meerwaldt, 8 Wash. 630.

Twohy vs. Linder, 144 Cal. 790, 793, 78 Pac. 233.

4. Section 431 of Remington's Code of Washington provides:

> "When a trial by jury has been had, judgment shall be entered by the clerk immediately in conformity to the verdict."

Independently of the statute, this is the fundamental rule.

> *Bennett vs. Butterworth,* 11 How. 670, 13 L. Ed. 859.
>
> *Swenson vs. Stoltz,* 36 Wash. 318.

The verdict (Record p. 34) finds that the plaintiffs are the owners of and entitled to the possession of "all of the property replevined by the marshal."

The judgment (Record p. 33) is that the plaintiffs are the owners of and entitled to the possession of "all of the property *replevined by the plaintiff* and seized by the marshal and now located," etc.

One of the definitions given by Webster's International Dictionary of the word "Replevied" is:

> "B To take or get back by a writ of replevin."

Now, "the plaintiff" never took, or got back, any property under the writ of replevin. The verdict did not find that it did so, and the judgment must follow the verdict. Being different from the verdict the judgment is bad.

> *Holliday vs. McKenzie,* 22 Fla. 153.
>
> *Leighton vs. Stewart,* 10 Neb. 224, 4 N. W. 1051.

Adding "and seized by the marshal" does not help the matter any. As we have heretofore shown, the marshal seized a large amount of property which

the plaintiff did not claim to own, or of which it had been denied possession.

5. The special verdict having found only upon two facts, viz, ownership and right of possession of the property "replevined by the marshal," which is not the property described in the complaint, and the findings are wholly outside the issues of the pleadings, this was equivalent to finding against the plaintiffs on every issue made by the pleadings, and plaintiff in error was entitled to judgment on the verdict.

> *Puterbaugh vs. Puterbaugh,* 131 Ind. 288, 30 N. E. 519.

6. Not only does the judgment depart from the verdict in designating the property, but it is bad for uncertainty in that it wholly fails to describe the particular property sought to be recovered. In *National Bank vs. Meerwaldt,* 8 Wash. 630, 635, an action to recover possession of a certain warrant, the Court says:

> "A judgment in such cases should be for the recovery of the personal property the possession of which was sued for. * * * The judgment did not describe the warrant and was therefore deficient."

In order to give a judgment the merit and finality of an adjudication between the parties, it must be responsive not only to the proofs, but to the issues tendered by the pleadings.

> *The Hoppet vs. U. S.,* 7 Cranch 394, 3 L. Ed. 380.

Crockett vs. Lee, 7 Wheat. 522, 5 L. Ed. 513.
Reynolds vs. Stockton, 140 U. S. 254, 35 L. Ed. 464.

This because pleadings are the very foundation of judgments and decrees.

Charles vs. White, 214 Mo. 187, 112 S. W. 545.

The marshal's return shows that he seized approximately 39,000 negatives, 41 Volumes of "North American Indian," 2 packages of prints, and 1 volume of Indian Days of Long Ago, which were not mentioned in the pleadings.

The verdict in this case was a special one, and the judgment on such a verdict must be the logical conclusion from the facts found by the jury, unaided by the evidence, or any extrinsic matter, though apparent in the record.

Suydam vs. Williamson, 20 How. 427, 15 L. Ed. 978.
Rice vs. Evansville, 108 Ind. 7, 9 N. E. 139.
State vs. Hammer, 143 N. C. 177, 69 S. E. 771.

Furthermore, a judgment rendered on a special verdict which does not contain a finding by the jury either for, or against, all the material facts put in issue by the pleadings will be reversed.

Ward vs. Cochran, 150 U. S. 597, 37 L. Ed. 1195.

And this even if the question is raised for the first time in the appellate court.

Hickey vs. Breen, 40 Mont. 368, 106 Pac. 881.

7. In addition to the foregoing, the law is that the judgment in actions of this kind must be confined to matters properly arising in the action.

Marks vs. McGhem, 35 Ark. 217.

That the subject matter of litigation necessarily consists only of the property described in the complaint, and there can be neither verdict nor judgment as to property other than that.

Lovensohn vs. Wild, 45 Cal. 8.

Lindley vs. Miller, 67 Ill. 244.

After adjudging that "plaintiffs are the owners of and entitled to the possession of all the property replevined by the plaintiff and seized by the marshal and now located in Room 64 Cobb Buidling, * * save and except the following:" (Record p. 37) there follows a list of ten items of property described as in the verdict, and then the judgment proceeds: "which said excepted property the plaintiffs are hereby ordered to return to the Curtis Studio, the place whence it was seized, or—in the event of their failure so to do—that they pay to the defendants the sum of nine and 50/100 ($9.50) Dollars, the value of said property."

The verdict does not find who does own the excepted property, nor does it speak as to the place from whence the marshal took it. The marshal "swears" (Record p. 23) that he did not take any of it at all. Edward S. Curtis testfiied (Record p. 69) that he was familiar with the property which the marshal seized in the action, and that all of it so

seized belonged to the North American Indian, excepting eight of the ten items set out in the judgment. Two of the items, therefore, were as non-existent as the plaintiff corporation, and it was quite in harmony with the result of the case that the non-existent corporation should be given the option of returning the non-existent property to a non-entity, or paying strangers its unknown value and becoming the owner.

When it is recalled that the judgment cannot look beyond the findings of fact contained in the verdict to any other fact, even though it be apparent in the record, or proven by the evidence, the utter illegality of this judgment is at once evident.

A judgment is void which is a departure from the pleadings, and based upon a case not averred therein.

Evans vs. Gibson, 29 Mo. 223.

Waldron vs. Harvey, 54 W. Va. 608, 46 S. E. 603.

Metcalf vs. Hunt, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407.

Falls vs. Wright, 55 Ark. 562, 18 S. W. 1044.

The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his pleadings.

Simms vs. Guthrie, 9 Cranch. 19, 3 L. Ed. 642.

People vs. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693.

Respinir vs. Porta, 89 Cal. 464, 26 Pac. 967.

Lovenshon vs. Ward, 45 Cal. 8.

Lindley vs. Miller, 67 Ill. 244.
Gille vs. Emmons, 58 Kan. 118, 48 Pac. 569.
Charles vs. White, 214 Mo. 187, 112 S. W. 1040.

Viewed from every aspect this whole case from pretended demand to judgment is a palpable attempt to deprive plaintiff in error of her property without due process of law. To that end there was no hesitation in prostituting and abusing the process of law. Prohibited from removing the property from the Curtis Studio of which he was in possession pending the appeal, by an injunction which he could not supersede, Edward S. Curtis conceived and carried out the scheme of using the name of the dissolved corporation of which he owned all the issued stock, common and preferred, excepting six shares, in making a pretended demand on himself, and in bringing the action against himself, to accomplish his purpose of preventing plaintiff in error from coming into possession of that which had been given her in the decree of divorce. The judgment herein is the result. I submit that it should be reversed and remanded to the District Court with directions to abate the action as to the North American Indian, and dismiss it as to the additional plaintiffs Pegram and Borglum. Also, that plaintiff in error recover her costs against Pegram and Borglum in this court.

Respectfully submitted,

JOHN G. BARNES,
Attorney for Plaintiff in Error.

NO. 3716

United States

Circuit Court of Appeals

For the Ninth District

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a Corporation, E. S. PEGRAM and GUSTON BORGLUM,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANTS IN ERROR

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 3716

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

MOTION TO DISMISS WRIT OF ERROR

Comes now the above named defendants in error and, appearing specially for this purpose only, move the Court for an order dismissing the Writ of Error and Appeal herein for the reason that the plaintiff in error has not served any notice of her application for the Writ of Error upon all of the necessary parties interested in this appeal; has not served or made parties to the citation all the necessary parties to this proceeding and whose interests would be injuriously affected by the judgment of this Court; has not joined herein all of the parties to the suit who would be injuriously affected by a reversal of the judgment herein, and has not procured an Order of Severance in refer-

ence to others of the parties to this suit, and more particularly specified, to-wit:

I.

No notice of the application for the Writ of Error has ever been sevred by the plaintiff in error upon the United States Fidelity & Guaranty Company, surety on the non-resident cost bond furnished by the defendants in error upon the motion of the plaintiff in error in the District Court; nor has it been joined in this action, or in this proceeding; nor has there been any Summons and Severance as to it, or any Order of Severance made in reference to it, and no Citation directed to it in this proceeding.

II.

On the ground that no notice of the application for Writ of Error has ever been served by the plaintiff in error upon Sue Phillips Gates, third party claimant to the property involved in this suit; nor has she been joined in the action or in this proceeding; nor has there been any Summons and Severance as to her, or any Order of Severance made in reference to her, and no Citation directed to her in this proceeding.

III.

On the ground that no Order or Judgment of Severance as to this proceeding has been made or allowed in this cause as to Edward S. Curtis, co-defendant of the plaintiff in error in the Court

below, in which proceeding both the plaintiff in error and her co-defendant, Edward S. Curtis, were both jointly affected by the result in the lower court; and that the plaintiff in error is prosecuting this Writ of Error without any Order of Severance ever having been made or allowed thereto by the lower Court.

ELIAS A. WRIGHT and
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Attorneys for Defendants in Error.

ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR.

I.

The argument on the motion to dismiss the Writ of Error for the reasons assigned need be but very brief, for, in our judgment, our contention in that regard has been definitely settled by both the United States Courts and the State Courts of the State of Washington.

As we understand it, under

> Federal Judiciary Code, Chapter 7, Section 721, shown at page 1123, Vol. 5, Federal Statutes Anno.,

the United States Courts, acting in the same District as the State Courts, will follow the procedure of the State Courts. The question as to the neces-

sity of notice of the application for the Writ of Error, service of the Citation upon, procuring Summons and Severance of, and making a party to the appeal of the United States Fidelity & Guaranty Company, the surety on the non-resident cost bond of the defendants in error —filed in the Court below upon the motion of the plaintiff in error—has been definitely settled by the Supreme Court of Washington.

Shippen vs. Shippen, 91 Wash. 610, 158 Pac. 247.

This case is directly in point in the present prosecution of Writ of Error. The Court will notice by looking at the Shippen case that the Legislature of the State of Washington, in 1909, passed an Act directing the entry of a judgment against the surety, as well as the one primarily liable, upon a cost bond. That particular section of the Act of the Legislature is found in Section 496 of Remington & Ballinger's Code. The Court will notice by Section 496 of Rem. & Bal. Code, and also by the discussion in the Shippen case, supra, that the Supreme Court of the State of Washington specifically held that since it was now settled by the Statute that the Court should enter a judgment against the surety upon a forthcoming bond when entering a judgment against the principal, that the surety was a necessary party to the appeal. Of course, the failure to take the necessary and required steps to make the United States Fidelity & Guar-

anty Company, surety on the cost bond, party to this procedure, is fatal to the plaintiff's Writ of Error. And the same argument and position is taken in referance to the third party claimant, Sue Phillips Gates, for when she filed with the Marshal her third party claim and he then in turn included this in his return, this would constitute an appearance as to her. See also

Estes vs. Trahue, Davis & Co., 128 U. S. 229, 32 Law Ed. 437.

Todd vs. Daniels, 16 Peters 521, 10 Law Ed. 1054.

Masterson vs. Howard, 10 Wall. 416, 417, 418; 19 Law Ed. 953, 954.

Hardy vs. Wilson, 146 U. S. 179, 181; 36 Law Ed. 933, 934.

The U. S. Supreme Court has held in the Estes case specifically that the judgment is distinctly against the claimants and their sureties on the bond, and that, too, jointly; and, further, that all parties against whom the judgment is entered would be jointly affected by the judgment for costs in this case if a reversal were had.

As to the necessity of joining all parties to the suit who would be injuriously affected by a reversal of judgment, see

Wilson vs. Kiesel, 164 U. S. 248, 41 Law Ed. 422.

Am. S. & Tr. Co. vs. Clark, (C. C. A.) 83 Fed. 230.

St. Louis Un. El. Co. vs. Nichols, (C. C. A.)

91 Fed. 832.

Boyle vs. Stuttgard & A. R. R., (C. C. A.) 84 Fed. 9.

Ill. Tr. & Sav. Bk. vs. Kilbourne, (C. C. A.) 76 Fed. 883.

Kidder vs. Fidelity I. & D. Co., (C. C. A.) 105 Fed. 821.

Lewis vs. Sittel, (C. C. A.) 165 Fed. 157.

The Supreme Court of the State of Washington has held that the filing of the cost bond by the surety constituted an appearance in the case by that party, and that by the act of filing the bond it has submitted itself to the jurisdiction of the Court and has become a party to the case.

In addition, the United States Fidelity & Guaranty Company executed the replevin bond as the surety in this cause, and both the cost bond as a non-resident executed by them and the replevin bond constituted an appearance, under the holdings of the Supreme Court of the State of Washington, of that company in this cause.

II

The record discloses the fact that Edward S. Curtis was served with a notice to join in the application for the Writ of Error and a refusal by his attorneys only to join therein, but the record does not disclose that any Order of Severance has ever been entered by the District Court after this refusal—on the part of the attorney only—on his part to join in the Writ of Error; and, of course, the

record fails to disclose any such proceeding whatsoever in referance to the other two parties, which we contend to be necessary parties to this proceeding and parties who were entitled to have notice thereof. The Federal Courts have uniformly held, as we understand it, that unless an Order of Severance has been procured by the party making application for the Writ of Error, and unless the same is incorporated in the record, that this is fatal to the jurisdiction of the Appellate Court.

Loveless vs. Ransom, 107 Fed. 627.
Hardy vs. Wilson, 146 U. S. 179, 181; 36 Law. Ed. 933, 934.
Godbe vs. Tootle, 19 Law. Ed. (U. S.) 831.
Estes vs. Trabue, Davis Co., 128 U. S. 229, 32 Law. Ed. 437.
Masterson vs. Howard, 10 Wall. 416, 19 Law. Ed. 953.
Humes vs. Third Nat'l. Bank, 54 Fed. 917.
Foster's Federal Practice, Vol. 3, Page 2449.
Montgomery's Manual of Federal Procedure, 2nd Ed., Chpt. 75, Paragraph 1651, Page 591, and cases there cited.

We submit that our Motion to dismiss the Writ of Error should be granted.

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C. K. POE and
A. J. FALKNOR,
Attorneys for Defendants in Error.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 3716

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF DEFENDANTS IN ERROR

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THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

STATEMENT OF THE CASE.

Without waiving their motion to dismiss the Writ of Error, the defendants in error call attention to the matters argued by the plaintiff in error in her opening brief.

This Honorable Court will see that the attorney for the plaintiff in error specifically disclaimed any interest in the property involved in this case, although he attempted not to do so. See Transcript of Record prepared by the plaintiff in error, Page 76; we quote as follows:

> "MR. BARNES. I am not claiming to be the owner of this property.
>
> MR. FALKNOR: Do you admit that you are not?

MR. BARNES: My answer does not say so. Have you found any place in there where we claim to be the owner?

MR. FALKNOR: You stated awhile ago—then you are disclaiming any interest in the property?

MR. BARNES: I am not disclaiming any interest in the (60) property; I am not disclaiming that; I am saying that this defendant is not claiming to be the owner of this property, and she never did claim to be the owner, but it is upon the plaintiff to prove right of possession."

In this cause, as shown by the supplemental transcript of the record, Edward S. Curtis, by specific bill of sale, sold all the Indian material, including "all the property and assets of every name and nature by him employed in connection therewith, including all copyrights, subscriptions, subscription rights, publications, and material for publication, plates, prints, and printed books, illustrations and material of every name, including choses in action and rights of action". It is apparent that Edward S. Curtis had conceived the idea of publishing twenty volumes of historical character of the Indians in North America, and furnish a portfolio in connection with each volume. He had become very much involved, owing about one hundred thirty-seven thousand dollars, when he entered into a contract with J. Pierpont Morgan for the financing of the deal and the sale of the assets, property

and venture to a corporation known as "The North American Indian". In the prosecution of this work the corporation had expended to the time of trial some eight hundred and fifty thousand dollars in completing eleven volumes of the work; nine volumes yet remained to be completed at the time of trial. It was necessary, in order to complete this work, to have the plates, subscription blanks, and all of the other assets purchased by the corporation. During the time the work was being prosecuted the corporation hired Mr. Curtis to assist them in the work and some of the material was left with him in his studio, the evidence we believe shows some forty thousand negatives, as well as other property which was replevined and seized in this case. Sometime in 1919, we believe, Mr. and Mrs. Curtis became involved in domestic difficulties in the Courts of the State of Washington. They had their daughter in charge of the studio and in charge of the property where the property of the North American Indian was located. Before the institution of this suit demand was made by the attorney for the defendants in error upon the daughter, who was the agent of the Curtises and had the property under her charge. She refused to deliver the same and replevin was instituted and the property taken from their possession by the United States Marshal, who held the same in his possession and deposited it in Room 64 of the Cobb Building, in Seattle, Washington, in charge of his deputy, one "Slade", pend-

ing the disposition and trial on the issues. There being such a voluminous amount of material and plates, the Court appointed an expert, one Mr. Albee, to segregate this material and identify the same with the copyrights which Mr. Curtis had assigned to the corporation, and tabulate the same for better identification in order that no mistake might be made. This was done by the Court for the purpose of expediting the trial. It took Mr. Albee some six weeks or more to go through this property, as he had been ordered to do. If the Court had not made such an order, of course, the trial would have lasted that long a time, or perhaps twice that long, and the expense would have been prohibitive in the trial of the cause.

At the trial the plaintiff in error made no defense whatever, except to introduce a couple of exhibits, determining to frustrate justice in this cause by mere technicalities, and at the same time disclaiming any ownership whatever in the property. This latter, of course, amounted to a disclaimer.

The Court will notice also by the supplement transcript of the record that, according to the contract and bill of sale made by Edward S. Curtis to the North American Indian, he not only sold all of the property then in his possession but agreed to make, execute and deliver good and sufficient assignments of any and all copyrights owned or employed by him in connection with the said business sold at that time, or thereafter obtained by him.

At the time of the trial some contention was made by the plaintiff in error that the North American Indian's corporate existence had ended, although she at no time introduced any specific evidence that under the laws of the State of New York the corporation had not already complied with the laws of New York for continuance of the life of the corporation. The plaintiff below, the corporation, to avoid any question of its right to the possession of the property, on motion, had the Trustees—who were directors of the corporation—added as additional plaintiffs.

No evidence being introduced by the plaintiff in error as to any right, claim, or title she had to any of the property, except what the evidence of the defendants in error had already indicated did not belong to The North American Indian, the Court, on motion of the defendants in error, instructed the jury to return a verdict for the defendants in error for the possession of the property. This was based on the ground, we believe and understand, because the evidence showed that the defendants in error were not only the owners of the property but were entitled to the possession thereof, and particularly due to the fact that the plaintiff in error disclaimed any right of ownership whatever in it.

On the addition of the Trustees, who were residents of the States of New York and Connecticut, the plaintiff in error did not make any contention

as to the diversity of citizenship. (See Transcript of Record proposed by plaintiff in error, Page 78).

A glance at the transcript of the record in this case will show the Court that the plaintiff in error in her answer admitted the value of the property to be $10,000.00.

The Marshal's amended return shows the property was seized in Seattle, in the United States District where the case was tried.

ARGUMENT AND AUTHORITIES

We shall endeavor to answer the many supertechnical objections of the plaintiff in error in the same order as contained in her brief.

In the beginning of this case we must bear in mind that the plaintiff in error, through her counsel in open court at the trial of the cause, admitted that she did not claim the property involved in this cause, and never had claimed it. (Transcript Page 76). There is nothing in the record either that she claims right of possession. It would seem, therefore, that there is no real reason for this proceeding, nor that any one would be benefited thereby.

I.

THE COURT DID NOT ERR IN DENYING MOTIONS OF PLAINTIFF IN ERROR TO QUASH WRIT OF REPLEVIN AND ITS EXECUTION BY THE MARSHAL.

The Statute applicable to claim and delivery, commonly known as a replevin action, of the State of Washington is as quoted by the plaintiff in error in her brief. The complaint of the plaintiff in error, in its last analysis, amounts to this: Because more was done than this Statute required, everything incident to the seizure of the property was void. The defendants in error followed this Statute and, in addition, procured a formal Writ of Replevin from the District Court. This was served upon the plaintiff in error, and the other defendants in the cause, along with a copy of the affidavit for replevin, as well as the bond. All that the Statute required was that the defendants in the cause be served with a copy of the affidavit and a copy of the bond. Plaintiff in error contends, however, that because a copy of the Writ of Replevin was served—and this writ was obtained from the Court—that this action would make the whole proceeding null and void. The mere statement by the plaintiff in error as to her position in reference to that phase, refutes itself. As a matter of fact in this kind of a case, under the State practice, it is not uncommon for a Writ, such as was issued in this cause, to be issued out of the State courts, although it is wholly unnecessary, as the Writ is not required and is superfluous.

The complaint of the plaintiff in error regarding the approval of the bond in replevin by the Judge of the Court instead of by the Marshal, does

not merit serious consideration. The purpose of the Statute requiring a bond to be given is to afford the defendants in a cause security. The surety on a bond such as this could not be heard to say that because the bond was approved by the Judge of the Court instead of by the Marshal that this circumstance would discharge it from its obligation. A plea such as that on the part of the surety would not be noticed, and, the purpose of the Statute having been subserved when the bond was filed in the cause, is all that should be required.

The surety on this replevin bond would be estopped to set up the defense which plaintiff in error intimates might be set up by this surety, and which is the basis of her argument, that no liability exists as to this surety and that the bond is, therefore, void.

> 23 R. C. L., pages 896 and 897, Sections 54 and 55.
>
> *Leeper, Graves & Co. vs. First Nat'l. Bank of Hobart,* 110 Pac. 655, 29 L. R. A. (NS) 747.

Moreover, sureties on a replevin bond are estopped to set up that the bond was not properly accepted and approved as provided by Statute, or filed as provided by Statute, after the property has been placed into the possession of the principal obligor upon the delivery of the bond.

> *Hartlep vs. Cole,* 120 Ind. 247, 22 N. E. 130.
> *Coverdale vs. Alexander,* 82 Ind. 503.

Parker vs. Young, 188 Mass. 600, 75 N. E. 98.
Harrison vs. Wilken, 69 N. Y. 412.

It requires considerable imagination, to say the least, to be convinced that because the Writ of Replevin in this cause was superfluous that the bond given in the cause was void, and that no liability attached thereto. Counsel for plaintiff in error says that the bond was given in order to procure the Writ of Replevin. He is so super-technical in this regard that he confuses himself. An examination of the bond discloses the fact that it was given for the purpose of procuring delivery of the property involved in the action. It makes no referance to the Writ of Replevin, is entirely independant thereof, and, of course, has no relation to the Writ itself, which must be treated merely as unnecessary process, but not, as counsel contends, void and unauthorized.

We may concede that the United States Marshal in this cause might have refused to have executed the Writ of Replevin, and might have refused to seize the property described in the affidavit for replevin—if he had seen fit to do so—until the bond, which had theretofore been filed with the Clerk of the United States District Court, had been approved by him. It is safe to assume that this officer knew of the bond, knew of its approval by the Judge, and was satisfied to act upon the matter as it came to him. Counsel for plaintiff in error does not endeavor to point out in what manner additional life

would have been given to this bond had it been stamped "approved" by the United States Marshal. All that the Statute means in referance to the approval of the bond by the officer serving it, is that that officer, who is charged with the seizure of the property called for in the affidavit for replevin, has the right to determine for himself the sufficiency of the sureties upon the bond. The statute merely gives him that privilege. Could it be said with any show of reason that, because the seizing officer did not approve the bond, the bond thus became void and the seizure illegal and void. This is not the meaning of the Statute, and after the Marshal has seized the property by virtue of the process placed in his hands, which consisted of all that the law required and also an unnecessary Writ—which damaged no one—the requirements of the Statute were met, and no error was commited by the Court in denying the motion to quash the Writ of Replevin, or its execution by the Marshal. Plaintiff in error could have followed the procedure which the Statute allowed her if she had seen fit. She was not prevented from excepting to the sufficiency of the surety, nor was she prevented from giving counter-bond if she had seen fit to do so. She did not claim the property, under the admissions of her attorney in open Court, and it is difficult to conceive how she can be deprived *of her property* without due process of law *when she claimed no interest therein.*

We consider it our duty to pay our respects to the alleged authorities which the plaintiff in error cites on this branch of the case.

Scott vs. McGraw, 3 Wash. 678,

decides nothing that is in any way applicable to this case.

The Virginia case of

B. & O. R. Co. vs. Hamilton, 16 Fed. 181,

a case peculiarly relied upon by plaintiff in error as substantiating her position, must be noticed, not because it is in point or has any bearing on this case at all, but as being significant of the authority which plaintiff in error submits as being helpful to this Court on this contention. An examination of the Virginia case discloses the fact that there is no provision in the law of the State of Virginia which permits an action either of claim and delivery or of replevin. It was for this reason that the Writ of Replevin was dismissed and not for the reason that the Writ was used when it was unnecessary, such as was done in this case. The case of

Hicks vs. Mendenhall, 17 Minn. 475, and
Rosen vs. Fischell, 44 Conn. 371,

are in no way applicable to the branch of the case on which they are submitted as authority. In those cases the Courts issuing the process were wholly without jurisdiction to issue the process which it purported to issue. This was not true in the present

case. We do not think that it is proper to say that the Writ of Replevin which was issued in the case at bar was unauthorized. We do concede that it was unnecessary, but we strenuously resist the assertion that it was not proper or unauthorized. We invite the Court's only casual consideration of the authorities submitted by the plaintiff in error as to the correctness of her position on this phase of the case, for we feel that the most casual glance at these authorities will demonstrate to the Court the utter inapplicability of the principles involved in those cases, and decided by those cases, to the facts of the case at bar. Moreover, the principle decided in the Minnesota case and the Connecticut case is the ancient rule and has been departed from by the courts in those states, and the rule announced is no longer followed by the courts, except by a decided minority.

II.

PLAINTIFF'S EXHIBIT 15.

Very little notice need be had of this Assignment, because it will be covered by our argument on the next phase of the case. Plaintiff in error, however, prefaces her argument in reference to the alleged error on the part of the trial court in admitting this Exhibit in evidence, as follows:

> "Plaintiff in error, having *specifically denied* the allegation of the complaint that the plaintiff therein was a corporation organized and

existing," etc.,

and goes on to state that the burden was thereupon cast upon the defendants in error to prove the corporate existence. The Court will notice later on that the effect of a pleading of this kind amounted to an admission, under the law, of the corporate existence and rendered it unnecessary for the defendant in error to introduce any testimony whatsoever in regard to the corporate existence. The Exhibit was certainly admissible in evidence under the principles of the Washington case of

State ex rel Clark vs. Superior Court, 114 Pac. 444.

Certainly the receipt of the Secretary of State of the State of New York for the franchise license tax was admissible as a receipt, and both instruments were admissible as public records. The ground for the objection of counsel to the introduction of this Exhibit (See Transcript Page 67) does not now permit her to urge the reasons for the alleged error which she now sets forth in her brief. Her objection was based upon the ground that the Exhibit was not properly authenticated. It certainly would have been proper for the defendants in error to have identified this Exhibit as being what it purported to be, assuming that that was necessary, and this they could have done if the plaintiff in error had incorporated that in her objection, but this she did not do, and we feel that no error was committed by his Honor in admitting the

Exhibit.

The Court, however, will understand that we most emphatically contend that the introduction of this Exhibit was not necessary to prove the existence of the North American Indian as a corporation, in view of the pleading of the plaintiff in error herself and for the reason that she had estopped herself from questioning the corporate existence of the North American Indian, Inc., as we shall now notice.

III.

THE ADDITION OF PARTIES PLAINTIFF.

Plaintiff in error complains strenuously about the action of the trial Court in adding as additional parties plaintiff the Trustees of the corporation at the time of trial. The Judiciary Code permitted this procedure, as well as did the Statutes of the State of Washington. Revised Statutes, Section 948, reads as follows:

> "Sec. 948 (Amendment of process). Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

Revised Statutes, Section 954, reads as follows:

"Sec. 954. (Defects of form—amendments).

No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such refect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

Remington & Ballinger's Annotated Codes, Statutes of the State of Washington, Section 303, provides as follows:

"Sec. 303. Amendments, Allowance of. The Court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The Court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just,

> an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this code, and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

By virtue of Section 948, it has been held that the real plaintiff in an action may be substituted for a nominal one, in whose name the action was brought.

The Court, in the case of

> *McDonald vs. State of Nebraska,* 101 Fed. 171, 41 C. C. A. 278,

used the following language, which is particularly appropriate to this situation, found on Page 178 of the opinion:

> "A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defend-

ant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to he commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations."

And by virtue of the same Statute it was held in

Clemens vs. Washington Park Steamboat Co., 171 Fed. 168,

that even after trial and judgment and an attempt had been made to collect a judgment recovered against a corporation of a similar name as the defendant, but which in truth and in fact was not the defendant in the cause—but which had really defended the action and, in fact, appeared—and there being no such person as the defendant named, that the trial Court had power to substitute the real defendant in the cause. To the same effect is

Bainum vs. American Bridge Company, 141 Fed. 179.

The attention of the Court is also especially invited to the case of

Davis vs. Seattle, 37 Wash. 223, 79 Pac. 784.

The Court in that case, among other things, used the following language, which is particularly appropriate to the situation in this cause:

> "The Court has held in *Hawkins vs. Front Street Cable Ry. Co.,* 3 Wash. 592, that an action for damages based on personal injuries sustained by the wife, must be brought in the name of the husband, and that the wife, while not a necessary party is a proper party to such action. While the respondent, Alice J. Davis, could not have recovered in this action suing alone, did the Court commit error in permitting the amendment whereby the husband, B. W. Davis, was made a party plaintiff, and afterwards with his wife recovered judgment? Sec. 424 Pierce's Code, Section 4953, Ballinger, provides: 'The Court may, in furtherance of justice and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party,' etc. We think that under this section and under the circumstances of this case the amendment was properly allowed. Appellant did not claim any surprise, made no request for a continuance, no new issues requiring additional preparation for trial were formed, unnecessary delay and loss of time were avoided; there was no material change in the cause of action or in the defense; and no abuse of discretion by the court was shown. The amendment was certainly in 'furtherance of justice,' was properly allowed, and was not erroneous. *Hulbert vs. Brackett,* 8 Wash. 438; *McDonough vs. Great Northern Ry. Co.,* 15 Wash. 244; *Allend vs. Spokane*

Falls & N. Ry. Co., 21 Wash. 324; *Morrissey vs. Faucett,* 28 Wash. 52; *Daly vs. Everett Pulp & Paper Co.,* 31 Wash. 255; *Thomas vs. Price,* 33 Wash. 459."

In the Missouri case of

Hackett vs. Van Frank, 96 S. W. 247,

it was held that where a suit or a cause of action in favor of a corporation was commenced in the name of the stockholders of the corporation, and the owners of all of the corporate stock, that an amendment was permissible and should have been allowed, which substituted the corporation itself as plaintiff instead of the stockholders, and that the same was not objectionable as changing the cause of action. There is also ample authority for permitting a suit to be waged by amendment in the name of the stockholders of a corporation after it has been instituted by the corporation itself, which had no legal existence at the time of the institution of the suit.

3 *Thompson on Corporations,* Section 3157.
Vermont Mining, Etc., Company, et al, vs. Windham Co. Bank, et al, 44 Vt. 489.

There can be no question but what it was within the discretion of the Court in granting the petition of Pegram and Borglum to be made additional parties plaintiff, not only in the interest of justice but for the purpose of avoiding multiplicity of suits, and for the purpose of disposing of the con-

troversy when all parties at interest were before the Court.

We do not believe, and never have felt, that it was necessary under the circumstances of this case for these men to have been made parties, but through an abundance of caution the procedure was adopted. Plaintiff in error at the time of trial and in her argument on this phase of the case, was permitted, over the objection of the defendants in error, to question collaterally the existence of the North American Indian, Inc., as a corporation, and she was permitted by the trial Court for the purpose of making her record to do so. There was testimony in the case ample to show business dealings of great magnitude between the corporation and the plaintiff in error and her former husband, Edward S. Curtis, which tranactions took place both before and after the martial difficulties between these two parties. Under such circumstances, neither of them could deny, under the overwhelming weight of authority, the corporate existence of the plaintiff in that action. Under such circumstances, both the plaintiff in error, and her former husband, was estopped from questioning the corporate capacity of the corporation with which they dealt.

In re Western Bank & Trust Co., 163 Fed. 713,

Kelleher vs. Denver Music Co., 109 Pac. 860,

and the multitude of cases cited in both of these opinions.

In addition, the plaintiff in error is not in a position to urge the fact that the North American Indian had ceased to exist, or that its charter had lapsed, for the reason that she has foreclosed herself from so doing by her own answer in this cause. By her answer (Transcript Page 8) she has contented herself with simply denying the allegation in reference to the corporate existence of the defendant in error. Under all of the authorities, the denial generally of the existence of a corporation, admits such corporate existence.

Union Cement Co. vs. Noble, 15 Fed. 502.
Pullman vs. Upton, 96 U. S. 328, 24 L. Ed. 818,
Emerson Co. of West Virginia vs. Nimocks, 88 Fed. 280.

Under these decisions the general denial of corporate existence does not put in issue either the corporate capacity to sue or the corporate existence. See also

Hodges vs. Kimball, 91 Fed. 845,

in which case the Court, on Page 848, used the following language:

> "The plea to the merits of the general issue in this case unquestionably admitted the representative capacity of the plaintiffs and their rights to institute and maintain the suit." (citing authority).

See also

3 *Thompson on Corporations,* Sections 3221, 3223 and 3224.

Bank vs. Patchin Bank, 13 N. Y. 309.

First Nat'l. Bank vs. Gibson, 84 N. W. (Nebr.) 259.

Conrad vs. Atlantic Insurance Co., 1 Peters (U. S.) 450.

Society vs. Pawlet, 4 Peters (U .S.) 500.

For the reasons stated, the plaintiff in error is in no position and cannot question the corporate existense of the North American Indian, Inc., for by her own pleading she has admitted its existence. If we are correct in this assertion the making of the additional parties plaintiff was unnecessary, but it did not operate to the prejudice of the plaintiff in error, and she should not be heard to complain. At the time of trial she did not claim surprise, nor ask for time in which to meet any additional issue which this action of the Court could possibly have injected into the case.

In addition, there was evidence which showed a presumption of corporate existence. There is the certificate of the Secretary of State of the State of New York as a corporation of the North American Indian, Inc., and the payment of the franchise license tax, evidenced by plaintiff's Exhibit "15". The plaintiff in error read into the case the Statute of the State of New York, which provided for an extention of the corporate existence of a domestic corporation (Transcript Page 71). In the absence of proof to the contrary, it seems to us that the ex-

tension of the corporate existence must be presumed in the face of the payment of the franchise license tax to a date subsequent to the original expiration of the corporate charter. Public officers are presumed to do their duty, and the legal presumption surely would be that they would not accept this franchise tax from a corporation that had ceased to exist. The fact of the corporation having been shown, the burden of showing a dissolution of the corporation would rest upon those who wished to establish such dissolution and who are in a position to urge such a question.

Regents vs. Williams, 31 Am. Dec. 74.

The acceptance by the State of New York of the license tax would be a recognition by that state of the existence of this corporation, and this would establish the corporate existence.

1 *Thompson on Corporations,* Section 170.

In addition, the validity of the existence of a corporation may not be inquired into in actions instituted for the protection of the rights and property of a corporation, nor in an action by such a corporation for trespass by wrongfully taking property from its possession.

1 *Thompson on Corporations,* Section 251.

Whether or not a corporate charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding. It can only be

raised in a direct proceeding between the sovereign power and the corporation.

> *St. Louis Gas Light Co. vs. City of St. Louis,* 84 Mo. 202, affirming 11 Mo. App. 55.
> *St. Louis vs. Shields,* 62 Mo. 247-251.

The evidence introduced was sufficient to establish at least prima facie proof of the existence of the North American Indian, Inc.

> *State ex rel Clark vs. Superior Court,* 114 Pac. 444.

The receipt for the payment of the franchise tax and the evidence before the Court, showed unquestionably that the North American Indian, Inc., had been exercising the functions of a corporation since December 1919, and that it, as a matter of fact in any event, was a de facto corporation, and, under the law, it was both entitled to sue, and be sued. The case of

> *Miller's Adm'x vs. Newburg Orrel Coal Co.,* 8 S. E. 600,

a West Virginia case, is particularly applicable, and, we think, conclusive on this branch of the case. The Court in the course of the opinion, on Page 601, used the following language:

> "The important question to be determined in this case is whether or not a duly incorporated and organized corporation, which continues its corporate business in its corporate name after the time fixed by its charter for its duration has

expired, can be sued and made liable as a corporation de facto for a tort committed by it after the limit fixed by its charter had expired. At common law, upon the death or dissolution of a corporation its reai estate reverted to the grantors or donors, and its personal property escheated to the king, while the debts due to and from it were thereby extinguished, and all actions pending for or against it at the time abated. *Rider vs. Factory,* 7 Leigh. 154; *Board vs. Livesay,* 6 W. Va. 44; *Mumma vs. Potomac Co.,* 8 Pet. 281."

And on Page 602 used the following very appropriate observation:

"In respect to the Newburg Orrel Coal Company—the corporation now in question—there can be no doubt that it was the duty of the directors, under the provisions of this statute, to wind up its business when its charter expired; but the facts show that they did not do so. On the contrary, the corporation continued to prosecute its business in its corporate name just as it had done before its charter expired. It continued to exist, as a matter of fact, after its franchise or legal right to exist had expired. It thus became a corporation de facto, but not de jure. As such de facto corporation it certainly possessed no special powers, such as the power to condemn property, and other like powers, which the law confers only upon corporations existing by legal right. But the courts cannot reasonably ignore the existence of such a corporation, if it is an immutable

> fact; nor are the acts and dealings had by and with it necessarily legally ineffective and of no binding force. 2 Mor. Priv. Corp. Sec. 1002, 1003; *Gas Light Co. vs. City of St. Louis,* 11 Mo. App. 55; *Briggs vs. Canal Co.,* 137 Mass. 71. The scope of the powers of the officers and agents of a corporation de facto must be fixed in the same manner as in case of a corporation de jure."

We finally contend on this phase of the case that plaintiff in error cannot urge error on the part of the Court in this regard:

1. On account of her dealings with the corporation.

2. Because she has foreclosed herself by her own pleadings.

3. That if the addition of the sole directors, Pegram and Borglum, as additional parties plaintiff was not necessary, it would be error without prejudice; that if they were necessary it was proper for the Court to interplead them in the case, as was done.

IV and V.

DIRECTED VERDICT.

As the record stood at the close of the case and after the additional parties had been aligned therein, there was no controverted fact to be submitted to the jury and the Court could do nothing else but grant the motion of the defendant in error for a di-

rected verdict. The plaintiff in error offered no evidence whatsoever as to the parts which she played in the detention in reference to the property of the defendants in error. The evidence was sufficient to at least show a constructive possession and detention on her part. It showed specifically the unlawful detention of the property by her co-defendant and former husband, Edward S. Curtis (Transcript Pages 63-64). It also showed the fact that plaintiff in error at that time claimed some property right to the premises where the property in dispute was kept. At that time the community existing between plaintiff in error and her former husband had not been finally dissolved by the Courts of the State of Washington, and the possession of her former husband—who was the business manager of the community existing between them—would be the possession of the plaintiff in error. The testimony was ample that a demand for the possession of this property was made by an authorized representative of the defendants in error, and this demand was refused by the representatives of the plaintiff's in error former husband, and between whom domestic litigation had not been finally terminated.

Much stress is laid on this phase of the case by plaintiff in error in regard to the fact that the verdict in the cause, as directed by the Court, does not describe the property with such definiteness and certainty that it might be clearly identified. We submit that the description of the property and the

property itself is sufficiently identified by the verdict under the authority of

Casey vs. Malidore, 19 Wash. 279, 53 Pac. 50.

In the beginning, defendant in error in its complaint set forth the property unlawfully detained and which it sought to recover. It is true that in its complaint it did not itemize and name the various positives and negatives. It simply described them as "a large assortment of Indian negatives, transparencies, records and manuscripts." The return of the Marshal follows the description of the property as contained in the complaint and in the affidavit for replevin somewhat more in detail. The Court will understand that all of this property was stored in Room 64 of the Cobb Building, in the City of Seattle, and during the time of trial thereafter was commonly referred to as being the property involved in the suit. This property, after it was stored, was afterward checked by a man appointed by the Court to assist the Court in identifying the property with the transfer hereof from Edward S. Curtis to the defendant in error (Transcript 46-51). The property was all identified by Edward S. Curtis himself (Transcript 69), and it does not seem to us that the description of the property in the verdict as being all of the property replevined by the Marshal, whose return of such seizure thereof was then on file, would be improper. To say that it would be necessary during all of these proceedings to have specifically itemized something over

38,000 negatives and transparencies by name would have made this proceeding so burdensome that no party would undertake the same. Such is not the policy of the Courts, and a suggestion thereof indicates the lack of merit on the part of the plaintiff in error in suggesting it. Plaintiff in error concedes that if the property is described in the complaint the description in the verdict may be made by reference to the complaint. We cannot gather any distinction between this and a reference to the property seized by the Marshal, and the reference thereafter in the verdict being made to his return, particularly when the return shows on its face sufficiently to convince any person with common understanding that the property referred to in the Marshal's return is the identical property referred to in the complaint and the affidavit for replevin.

It is also contended that the verdict was fatally defective in that it did not find the value of the property referred to therein. Again the pleading of the plaintiff in error confronts her and is a complete answer to the very error which she is urging. Her answer specifically admitted that the value of the property was $10,000.00 (Transcript Page 8). In addition, the affidavit for replevin sets forth the value of the property as being $10,000.00 (Transcript Pages 15 and 16), and this at no time was controverted by the plaintiff in error, or her co-defendant by any testimony. Under such circum-

stances the law is well settled that there is no issue to be submitted to the jury as to the value of the property involved in the suit.

Peterson vs. Woolery, 9 Wash. 390, 37 Pac. 416.

Winton Motor Carriage Co. vs. Blomberg, 84 Wash. 451, 147 Pac. 21.

There is also some contention that because the verdict in this cause was not in the alternative, either for the return of the property or for the value thereof, that it is for that reason void. An examination of the record in this cause, and particularly the petition of the plaintiff in error in the Court below for a new trial (Transcrips Pages 82-87), will fail to disclose that such ground was urged in the lower Court, or called to the Court's attention. Under such circumstances the law is that the verdict is sufficient without being in the alternative.

McGraw vs. Franklin, 2 Wash. 17.

There are many other trivial technicalities injected by plaintiff in error on this branch of the case, but they were all submitted to the trial Court and argued at length by counsel for plainiff in error and the patience of the trial Court exhausted, and we do not feel disposed to answer them in detail.

VI.

Plaintiff in error halfheartedly contends that the Court erred in taking from the the jury the right

to pass upon the jurisdictional issue of the diversity of citizenship and the existence of the plaintiff corporation. The complete answer to that is, that the pleadings admitted the diversity of citizenship, and the previous argument disposes of the existence of the plaintiff corporation.

Moreover, the record affirmatively shows that at no time did the plaintiff in error contend that the sole trustees, who were made additional parties plaintiff to the action, were not residents respectively of the State of New York and the State of Connecticut, which would, of course, of necessity, and of itself, established diversity of citizenship. (Transcript Page 78).

VII.

The error assigned on the action of the Court in denying motion of plaintiff in error for a new trial, and the argument thereon, of course, is merged in all the previous assignments, and no discussion need be advanced thereon.

VIII.

Plaintiff in error uses much space in urging that the judgment entered is void. She prefaces this assertion and bases her argument on the fact that the North American Indian, Inc., had been dissolved long before the demand for possession, or the commencement of the action, and that, therefore, any judgment in its favor, or any judgment to which

it was a party, is an absolute nullity.

Our previous observations in reference to the estoppel of the plaintiff in error to question the corporate existence of the North American Indian, Inc., likewise applies to this phase of the case with all its vigor as it does to the branch of the case to which it was previously applied. What difference can it make to the plaintiff in error, in any event. The judgment as entered in this cause conforms to the verdict, and reasonable sensible minds cannot differ thereon. Plaintiff in error consumes considerable space in criticizing the language of the judgment, but it amounts to nothing more than a super-technicality and haggling over the English language. There can be no reason for questioning the description of the property as being "all of the property replevined by the Marshal" and "all of the property replevined by the plaintiff and seized by the Marshal and now located", etc. We have heretofore shown that the property was sufficiently described and that no one has been misled at any time thereby. This should be sufficient to substantiate the judgment. There is some argument contained on this phase of the case that there were certain items of property set out in the plaintiff's complaint that the Marshal was not able to find, and also that there were certain articles of property seized by the Marshal which were not mentioned in the pleadings, nor called for in the affidavit of replevin, and for this reason it is contended that the

seizure by the Marshal of all of the property would fail. The mere statement of an assertion so ridiculous is the answer to the same. It is easy to understand how the officer seizing such a volume of property as was seized in this case might neglect to secure some of the property mentioned in the complaint and the affidavit for replevin, and it is likewise as comprehensible how the levying officer might also seize property intermingled with the chattels involved in the action unintentionally. This was done in this case, and the Marshal did seize property, which the defendants in error did not claim, of the value of $9.50, which value was not controverted by the plaintiff in error, or by any other evidence. This latter property was excepted from the judgment and the Court decreed that the defendant in error should return the same to the Curtis Studio, or pay the value thereof. This is the usual procedure in such cases and it is beyond our comprehension as to why any complaint should be made in that regard. In the last analysis the judgment follows the verdict and the pleadings and no person of common understanding can be misled thereby. For the reasons which we have indicated before we do not believe that it was necessary to have specifically itemized the various articles in the judgment, and that the reference to the Marshal's return contained in the said judgment was entirely sufficient.

In closing, we simply say that we trust that the

Court will give to the authorities cited by the plaintiff in error just such consideration as they are entitled to as being controlling of the issues in this case. Some of the authorities contain assertions upon some principles of law not applicabe to the the law and facts in this case—that on a cursory examination would appear to have some weight—but, considering the mass that we have been compelled to wade through, we have no hesitancy in saying that substantially all of the authorities of the plaintiff in error have reference to some other principle of law that is not involved in this cause in any way. If we had felt that it would have been of assistance to your Honors in dealing more in detail with the authorities of the plaintiff in error, we would have done so, but such action on our part would have extended this argument far beyond the realm of reasonable indulgence, and would have been unnecessarily burdensome to the Court, and, probably, of very little assistance. We are confident that this Court, upon examination of the authorities of the plaintiff in error, will view them in the same light in connection with the record in this cause as do we, and for that reason we have passed them by without further notice.

This case, from its beginning to the end, has been impeded by the plaintiff in error in this cause by every plea, technicality and objection known to the law, simply for the purpose of venting her spleen upon a business institution which at one time

was so unfortunate as to enter into business negotiations with the plaintiff in error and her former husband, with whom she became estranged. It in no wise was responsible for the domestic difficulties which befell them. She does not claim the property involved in this action and, as stated by her counsel, never did claim it, but in the face of this statement contests the rightful owner's right of title and possession thereto from beginning to end.

We submit that the Writ of Error should be dismissed for the reasons first stated herein, and, in any event, it should be dismissed for the reason that there can be no cause for controversy over property which is admittedly the property of the defendants in error, and to which the plaintiff in error has disclaimed any ownership through her own counsel in open Court. We can conceive of no appellate proceeding having less merit than the one involved in this action, and respectfully submit that the judgment of the lower Court should should be affirmed.

Respectfully submitted,

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No. 3716

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Reply Brief of Plaintiff in Error

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Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Reply Brief of Plaintiff in Error

I.

On the Motion of Defendants in Error to Dismiss the Writ of Error.

Rather than consume the time of the court in showing that the argument that the United States Fidelity & Guaranty Company, the surety on the cost bond, should have been made a party defendant

to the Writ of Error, is wholly without foundation, plaintiff in error adopts the speedy method taken by the appellants in the cases of

Roberts vs. Pacific Tel. & Tel. Co., 93 Wash. 233;

Zuhn vs. Horst, 100 Wash. 359, 362;

and here and now comes into court and expressly and explicitly disclaims and waives any right that she might have upon any contingency whatever, to any judgment for costs which she might have against the United States Fidelity & Guaranty Company upon the costs bond filed in the United States District Court for the Western District of Washington, Northern Division, on the 17th day of May, 1920, in cause No. 5225 therein, entitled *The North American Indian, Inc., a corporation, Plaintiff, vs. Edward S. Curtis and Clara J. Curtis, formerly husband and wife, and Curtis Studio, Defendants,* in which said company is the surety, and here and now stipulates and agrees that such costs bond may be held for naught, and forthwith cancelled.

As to Sue Phillips Gates, she was never at any time a party to the action, nor a party to, or in any manner whatsoever, even in the remotest degree, interested in the judgment appealed from.

Section 716 of Remington's Code of Washington, which is a part of the claim and delivery statute, and which I did not print in my opening brief,

provides that if the property which the sheriff takes under the affidavit and bond delivered to him is claimed by any other person than the defendant, or his agent, and such other person makes affidavit of his title thereto, or his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand, indemnify the sheriff against such claim by a bond.

Acting in accordance with this provision of the law, Mrs. Gates filed with the Marshal her affidavit in which she claimed a portion of the property which the Marshal had returned as seized by him under the writ of replevin. The Marshal demanded, and received from the alleged plaintiff an indemnity bond running to him, as provided by the statute, refused to deliver to Mrs. Gates the property claimed by her, and made a return to that effect.

To protect her rights Mrs. Gates had one of several remedies open to her.

Nasser vs. Gaston, 70 Wash. 685.

She could have intervened in the claim and delivery action; she could have brought an action against the Marshal to recover the possession of the property claimed by her, or she could have sued

the marshal for conversion, as was done in *Nasser vs. Gaston,* 70 Wash. 685.

What she did do is not before this court. She did not intervene in the claim and delivery suit, is not party thereto, is not affected by the judgment, and could not be made a party defendant to the writ of error.

Myers vs. Credle, 63 N. C. 504.
Payne vs. Niles, 20 How. 219, 15 L. Ed. 895, 896.

It is claimed that because there was not a formal order or judgment of severance as to Edward S. Curtis the writ of error should be dismissed. In summoning and severing Mr. Curtis plaintiff in error followed the exact procedure approved by this court in the case of *Excelsior Wooden Pipe Co. vs. City of Seattle,* 117 Fed. 140, 143, which ought to be sufficient to dispose of this contention. Counsel say, page 6 of their brief, and repeat it, that there was a refusal by the attorneys only of Mr. Curtis to join in the application for the writ. These statements are unworthy of counsel. The written refusal reads "notice (is) hereby given that the defendant Edward S. Curtis refuses to join in the application for a Writ of Error in the above entitled action." (Record, p. 90.)

In addition to all this, the judgment chal-

lenged by this writ of error is in no sense a joint one. Mr. and Mrs. Curtis appeared separately in the action; he made no defense whatever, but, on the contrary, appeared as a witness for the North American Indian of which he held all but six shares of its capital stock.

Alsop vs. Conway, 188 Fed. 572, and cases cited.

Love vs. Export Storage Co., 143 Fed. 1.

It is submitted that the motion to dismiss should be denied.

II.

At the outset I feel that there are certain statements made in the brief of counsel for defendants in error which should not go unnoticed.

1. On pages 9, 13, 14, 18 and 43 of said brief much is made of the asserted fact that during the trial of the case plaintiff in error, by her attorney, disclaimed any interest in the property involved. In one or two instances attention is called to the fact that this disclaimer was put in the bill of exceptions prepared by plaintiff in error.

The record, pages 75, 76 and 77, discloses everything that was said in that connection. What was there inserted was done so, as counsel well know, at their instance. The bill of exceptions proposed

by plaintiff in error, and lodged with the Clerk, did not contain it, because it was not considered of any importance one way or the other. Counsel for defendant in error proposed it as an amendment to the bill of exceptions, and the court allowed the amendment. When the engrossed bill containing the amendments was prepared it was by inadvertence called the proposed bill of plaintiff in error, instead of the engrossed bill.

What was said occurred after all the evidence had been submitted, the case rested by both parties, and during the argument on the motion to make Pegram and Borglum additional parties. In the course of that argument I had said to the court that the gist of the action was the unlawful detention of the property, and the court asked:

> "What about the necessity of any demand, since you came in and claimed it?"

In answer to this, and some questions interjected by counsel for plaintiff, I stated that in her answer plaintiff in error had not claimed to be the owner of the property, and therein never had claimed to be the owner, all of which is true as shown by her answer, and I further explicitly stated that she was not disclaiming any interest in the property.

2. On page 11 of the brief it is said:

> "Before the institution of this suit demand

> was made by the attorney for the defendants in error, upon the daughter, who was the agent of the Curtises and had the property under her charge."

Such assertions are not borne out by the record. The demand, if such it could be called, was made as attorney for and in the name of the North American Indian alone. Pegram and Borglum, the other defendants in error, were not mentioned. Several months before this pretended demand was made the North American Indian had ceased to exist. Therefore, it could not have an attorney.

> *Wamsley vs. Horton,* 34 N. Y. S. 306.
>
> *Austen vs. Columbia Lubricating Co.,* 87 N. Y. S. 497.
>
> *In re. Norwood,* 32 Hun. (N. Y.) 196.

There is literally nothing in the record showing that Miss Curtis was the daughter of Mr. and Mrs. Curtis, or that she was their agent.

3. The statement on page 35 that

> "At that time (the time of the alleged demand in March, or April, 1920) the community existing between plaintiff in error and her former husband had not been finally dissolved by the courts of the State of Washington, and the possession of her former husband—who was the business manager of the community existing between them—would be the possession of the plaintiff in error,"

is neither founded upon the record, nor true in fact.

Passing by the absurdity that a "community" could exist between plaintiff in error and "her *former* husband," the record shows that Mr. and Mrs. Curtis were divorced by a decree of the Superior Court of King County entered on the 24th day of June, 1919. The record further shows (pp. 115, 117) that Mr. Curtis did not appeal from the decree of divorce, but only from that part of it disposing of the property of the parties. The moment the decree of divorce was entered the marital "community" composed of Mr. and Mrs. Curtis was dissolved with the marriage relation, because it has, and cannot possibly have, any existence separate and apart from husband and wife.

Even if Mr. Curtis had appealed from the decree of divorce, such appeal would not have vacated, or in the slightest degree affected the validity of the dissolution of the marriage tie.

Masterson vs. Ogden, 78 Wash. 644, 647.

So the truth is, that at the time of the pretended demand, and for at least nine months immediately preceding that time, a "community" did not exist. The supersedeas bond given by Mr. Curtis effectually prevented Mrs. Curtis from taking possession of, or exercising any control whatsoever over the property awarded her by the decree of the

Superior Court. Under that bond Mr. Curtis was in sole adverse possession thereof.

State ex rel. Schloss vs. Superior Court, 3 Wash. 696.

II.

The claim is made, pages 16 and 17 of the brief, that sureties on a replevin bond are estopped to set up that the bond was not properly accepted, approved, or filed, *as provided by statute,* after the property has been placed in the possession of the principal obligor on the bond.

In this case the property was never placed in the possession of the North American Indian. It was a physical impossibility to do so,because that company was dead. Pegram and Borglum are not in any way parties to the bond, or any bond, nor does the surety obligate itself to make good any act or dereliction of theirs. The record shows that the Marshal at all times kept possession of the property he seized. Indeed, on page 11 of the brief the statement is made:

> "The property (was) taken from their possession by the United States Marshal, who held the same in his possession and deposited it in room 64 Cobb Building, in Seattle, Washington, in charge of his deputy, one 'Slade,' pending the disposition and trial on the issues."

Under the statute (Sec. 711, Brief of Plaintiff

in Error, p. 29) it was the duty of the Marshal to deliver the property to the plaintiff after three days from the time of service of affidavit and bond. He could not do that because there wasn't any plaintiff to deliver it to.

The cases cited in this connection fully bear out the contention, and cases cited, by plaintiff in error. Take the first case cited, *Hartlep vs. Cole,* 120 Ind. 247, 22 N. E. 130. Therein the court says:

> "It is too late for appellants, after having executed the replevin bond, and obtained possession of the property, to set up as a defense to the action that the statutory provisions in regard to the *execution* of the bond were not technically complied with. The law of estoppel will not allow such an unconscionable defense. But, *the bond having been delivered to the sheriff, and he, acting upon such delivery,* turned the property over to the appellant Hartlep, it constituted an acceptance and approval of the bond."

In the case at bar neither the affidavit, nor the bond, were ever delivered to the Marshal, and he never acted thereon. What he acted upon and what he made his return upon—notwithstanding the statute (Sec. 717, p. 30, Brief of Plaintiff in Error) expressly required him to file *the affidavit,* with the proceedings thereon, with the clerk of court—was an utterly void writ of replevin, void because the court was without jurisdiction to issue it. The

case at bar is on all fours with *Hicks vs. Mendenhall,* 17 Minn. 475. Counsel says that in that case, and in the Connecticut case, the writs were void because the courts who issued them were without jurisdiction so to do, but that the District Court had jurisdiction to issue the writ in the case at bar. Why did not the Minnesota court have jurisdiction to issue the writ of replevin? Because the statute did not provide for its issuance; because the statute provided identically the same as the statute of Washington provides, that the affidavit and bond should be delivered to the sheriff, constituted his process, for the form and sufficiency of which he, and he alone, was responsible. The District Court had just as much jurisdiction to issue the writ of replevin in this case, and no more, as did the Minnesota court in that case—which wasn't any.

It is said that an examination of the bond in this case discloses the fact that it was given to procure a delivery of the property, not to procure a writ of replevin. It is true that the bond (Record p. 17) recites that

> "Whereas, the said plaintiff being desirous of having the said personal property delivered to it, *has delivered to the United States Marshal of the Western District, Northern Division, the proper affidavit, and required him to take the said property from said defendants;"*

it is also true that the italicised part of that recital

is false. The order of the court directing the issuance of the writ of replevin recites that it is made, among other reasons, because the "plaintiff has furnished good and sufficient bond," inasmuch as the court had theretofore usurped the rights and powers of the Marshal and approved the bond, I still stick to my original statement that the bond was given to procure the writ of replevin, and for no other purpose.

In view of the contemptuous reference to the applicability of *B. & O. R. Co. vs. Hamilton,* 16 Fed. 181, I would most respectfully ask the court to read the whole of the short opinion in that case. If it will do so it will be in a position to judge of the accuracy and reliability of the statement of counsel that

> "An examination of the Virginia case discloses the fact that there is no provision in the law of the State of Virginia which permits an action *either of claim and delivery* or of replevin. *It was for this reason that the writ of replevin was dismissed.*"

III.

Upon the question of error claimed in adding Pegram and Borglum as plaintiffs the attention of the court is especially invited to *Davis vs. Seattle,* 37 Wash. 223, and a long excerpt from that case printed. In that case the husband was not made a

party plaintiff after all the evidence was in on both sides, without any evidence as to him, and without any issues made as to him. It was disclosed by the evidence offered by plaintiff that she was a married woman. Defendant made a motion for non-suit because the husband was not a party plaintiff. The opinion says:

> "Prior to any ruling on this motion for judgment, the respondent Alice J. Davis, then the sole plaintiff, moved the court for leave to amend the complaint, by making her husband, B. W. Davis, a party plaintiff. This motion was granted, *an amended complaint was filed,* and the husband, B. W. Davis, being present, appeared by his attorney, submitted himself to the jurisdiction of the court, and agreed to abide its decision."

In this case the sole plaintiff, North American Indian, which the affirmative proof of plaintiff in error had shown was non-existent, after both parties had rested their case, made a motion for an instructed verdict in its favor. There was not a scintilla of evidence at that time, or thereafter, that Pegram and Borglum were in any way interested. The North American Indian did not move that its complaint be amended by adding Pegram and Borglum. On the contrary, those gentlemen, entire strangers to the record, asked that they be added as plaintiffs. In short, they were seeking to intervene in the action, but without complying with sec-

tions 202 and 203 of Remington's Code of Washington, which provide for, and regulate intervention. Under those provisions when a stranger has been granted leave to intervene he must serve a copy of his complaint upon the parties to the action, who may answer or demur to it, and trial had on the issues made thereby. It is also provided that no intervention shall be cause for delay in the trial of an action between the original parties thereto.

Say counsel for defendants in error:

> "At the time of trial she (plaintiff in error) did not claim surprise, nor ask for time in which to meet any additional issue which this action of the court could possibly have injected into the case."

In view of the fact that no additional issue was made by Pegram and Borglum it is hard to see how plaintiff in error could have asked for time to meet that which was non-existent.

It is difficult to follow the reasoning of counsel on this question. They say:

> "We do not believe, and never have felt, that it was necessary under the circumstances of this case for these men to have been made parties."

Nevertheless, the judgment which the writ of error in this case challenges, declares that Pegram, Borglum, and the dead corporation, are jointly the

owners of, and entitled to the possession of a large and valuable amount of property; that they are jointly given the option to return to the trade name "Curtis Studio," certain other property of unknown value which counsel in their brief admit the Marshal seized without any semblance of right or authority, or pay to Mr. and Mrs. Curtis jointly the munificent sum of $9.50, and thereby become the joint owners of such property.

Counsel say that the reason it was unnecessary to make Pegram and Borglum parties was because plaintiff in error

1. Was estopped to deny the existence of the North American Indian by reason of business dealings of great magnitude between the corporation and plaintiff in error and her former husband. Even if such business dealings were established, which we deny, we cannot understand how they would work an estoppel preventing Mrs. Curtis from denying the existence of the corporation at the time it alleges she committed a tort against it by unlawfully denying it possession of its property. Estoppel by business dealings refer only to the time of such transactions, and on account of which the one party is put in a worse position than before. Even if plaintiff in error had received property from the North American Indian after the expiration of its

existence, she would be estopped to deny her responsibility for the property, but she would not be estopped to deny that the company was without capacity to sue her therefor.

Krutz vs. Paola Town Co., 20 Kan. 397.

The North American Indian has never claimed that plaintiff in error ever wrongfully, or otherwise, took or received any of its property.

In their argument counsel lose sight entirely of the fact that in this case the jurisdiction of the District Court depended upon the fact of whether or not it was a citizen of the State of New York, as alleged in its complaint. The law is that the fact that both the North American Indian, and plaintiff in error, might, on account of business dealings between them, be estopped to deny the corporate existence, would not make the North American Indian a citizen of the State of New York, so as to give the District Court of Washington jurisdiction of this action on the ground of diverse citizenship. In order to be a citizen of the State of New York the North American Indian must be a corporation *de jure* under its laws.

Gastonia Cotton Mfg. Co. vs. W. L. Wells Co., 128 Fed. 369.

In short, citizenship cannot be created by estoppel.

Furthermore, the law is well settled that even if plaintiff in error had contracted with the North American Indian during its existence, and the suit was upon such contract, she would not be estopped to show that it had been dissolved by the expiration of the duration of its existence.

Bank of U. S. vs. McLaughlin's Admnr., 2 Cranch C. C. 20;

Clark vs. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083;

Bank of Galliopolis vs. Trimble, 6 B. Mon. (Ky.) 599.

2. That by her answer she had foreclosed herself of the right to question the existence of the North American Indian. In this connection counsel say that "Under all the authorities the denial generally of the existence of a corporation, admits such corporate existence." Such is not the fact. The following cases all hold that just such a denial as plaintiff in error made in her answer in this case raises the issue of corporate organization and existence.

Roberts vs. Lewis, 144 U. S. 653, 36 L. Ed. 579;

Roberts vs. Langenbach, 119 Fed. 349;

Yocum vs. Parker, 130 Fed. 770;

Toledo Traction Co. vs. Cameron, 137 Fed. 48;

Cole vs. Carson, 153 Fed. 278;

Lindsay-Bitton Live Stock Co. vs. Justice, 191 Fed. 163.

In this last case the denial of corporate citizenship was in the exact words of the answer of plaintiff in error in this case. The court held that this denial put in issue plaintiff's allegation of diverse citizenship of the parties, and imposed upon him the obligation and indispensable duty of proving that allegation.

In Vol. 4, *Fletcher Cyclopedia Corporations,* page 4621, it is said:

> "but the general denial or the denial in general negative terms introduced by the codes is a more extensive pleading than was the general issue, and the general rule accordingly is that in the code system, and its likes, the issue may be presented by a denial fully responding to the allegations of existence in the complaint."

In addition, it is claimed:

1. In the absence of proof to the contrary, the extension of the corporate existence must be presumed. Such is not the law.

Yankton Nat. Bank vs. Benson, 33 S. D. 399, 146 N. W. 582, 584.

Moreover, plaintiff in error proved affirmatively by the witness Albert that in the latter part of August, 1920, he and two others, had executed and

filed with the Secretary of State of the State of New York a certificate of incorporation of a corporation with the identical name of the plaintiff corporation, and this court will take judicial notice of the law of the State of New York which prohibits the Secretary of State from filing such certificate with duplicate name, if the old corporation was still in existence. In addition to all this the court adjourned the trial four days to enable counsel to show an extension of the existence of the corporation if they could do so, telling them that they could get it by telegraph.

2. That whether or not a corporate charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding, that it can only be raised in a direct proceeding between the sovereign power and the corporation.

In Vol. I., *Fletcher Cyclopedia Corporations,* page 577, it is said:

> "By weight of authority, however, a corporation is dissolved and ceases to exist when its charter expires, unless there is some statutory provision to the contrary, for there is no longer any law under which it can exist, and therefore it cannot, after expiration of its charter, be a corporation either de jure or de facto. According to this view, its right to exercise corporate powers, including the right to sue as a corporation, may be questioned collaterally."

This statement is amply fortified by citations from decisions of the courts of the United States, Indiana, Kansas, Michigan, Missouri, New York, Tennessee and Virginia.

In the given Missouri case, *Bradley vs. Reppell,* 133 Mo. 545, 34 S. W. 841, 32 S. W. 645, it is pointed out that the statement to the contrary in *St. Louis Gaslight Co. vs. St. Louis,* 84 Mo. 202, cited and relied upon by defendants in error, is dictum, and hence not controlling.

3. That the North American Indian introduced evidence to show at least *prima facie* the existence of the corporation. We claim that it made no such showing, but however that may be, it was utterly refuted and destroyed by the affirmative proof introduced by plaintiff in error.

4. That the proof showed that in any event the North American Indian was a de facto corporation, because it had been functioning as such since December, 1919, and as such was entitled to sue and be sued.

The proof necessary to show a de facto corporation was entirely wanting.

Milwaukee Gold Extraction Co. vs. Gordon, 37 Mont. 209, 95 Pac. 995.

Continuing to do business after the expiration

of its existence, even if it had done so, of which there is no proof, would not enable it to maintain this action.

Clark vs. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083;

Bradley vs. Reppell, 133 Mo. 545, 34 S. W. 841, 32 S. W. 645.

Nor would the fact that it was a de facto corporation make it a citizen of the State of New York. It would of necessity have to be de jure a corporation to be that.

Gastonia Cotton Mfg. Co. vs. W. L. Wells Co., 128 Fed. 369.

Respectfully submitted,

JOHN G. BARNES,

Attorney for Plaintiff in Error.

No. 3721

United States
Circuit Court of Appeals

For the Ninth Circuit.

W. R. GRACE & COMPANY, a Corporation,
Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED
AUG 17 1921
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3721

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

No. 16,058.

W. R. GRACE & CO.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., et al.,

Respondents.

Praecipe for Apostles on Appeal.

To the Clerk of Said Court:

Sir: Please prepare apostles on appeal to contain the following papers:

Caption.

Statement required by Admiralty Rule 4, Circuit Court of Appeals.

Libel.

Claim of Ford Motor Co. of Canada, to Autos and Parts.

Claim of Ford Motor Co. of Canada, to property seized *in rem.*

Return of Southern Pacific Co.

Answer.

Exception to Answer and Interrogatories.

Opinion of Court overruling exceptions.

Testimony.

Exhibits.

Opinion ordering libel dismissed.

Final Decree.

Notice of appeal. [1*]
Assignment of errors.
Praecipe.

ANDROS & HENGSTLER,
Proctors for Libelant.

[Endorsed]: Filed Jun. 1, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the District Court of the United States, Northern District of California, First Division.

No. 16,058.

W. R. GRACE & COMPANY, a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

Statement of Clerk U. S. District Court.

PARTIES.

Libelant: W. R. GRACE & COMPANY, a Corporation.

Respondents: FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES.

Claimant: FORD MOTOR COMPANY OF CANADA, LTD., a Corporation. [3]

PROCTORS.

For Libelant: Messrs. ANDROS & HENGSTLER, and LOUIS T. HENGSTLER, Esq., and F. W. DORR, Esq.

For Respondents and Claimant: Messrs. McCUTCHEN, WILLARD, MANNON & GREENE, W. F. WILLIAMSON, Esq., and Mesrs. PILLSBURY, MADISON & SUTRO.

PROCEEDINGS.

1916.

June 27. Filed libel *in rem* and *in personam,* for breach of contract ($319,-500.00).

Ordered citation on order for foreign attachment issue.

Issued citation on order for foreign attachment, which was returned and filed July 11, 1916, as a part of the return of Southern Pacific Company. The return of the United States marshal endorsed thereon is copied elsewhere in the apostles.

Issued citation, citing the respondent, Ford Motor Company of Canada, Ltd., to appear and answer the libel herein on July 11, 1916, which was afterwards to wit, on July 11th, 1916 returned, with the following return of the U. S. marshal endorsed thereon:

"I hereby return that I am unable to find the Respondent Ford Motor Company of Canada (Ltd.), a corporation, in my District, this 11th day of July, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.
By Geo. H. Burnham,
Chief Deputy Marshal." [4]

Issued Monition for the attachment of Certain Automobiles and Part in Packages, which was returned on July 11th, 1916, with the following return of the United States marshal endorsed thereon:

"In obedience to the within Monition, I attached the property herein described, on the 27th day of June, 1916, and have given due notice to all persons claiming the same that this Court will, on the 11th day of June, 1916 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named

property and placed a keeper in charge thereof.

J. B. HOLOHAN,
United States Marshal.
By Laurence J. Conlon,
Office Deputy.

San Francisco, Cal., July 11, 1916."

July 5. Filed claim of Ford Motor Company of Canada, Ltd., to 1100 packages of automobiles seized under process issued *in rem*.

Filed claim of Ford Motor Company of Canada, Ltd., to property seized under authority of citation on order for foreign attachment.

Filed stipulation that property claimed by respondent may be released upon the filing of an admiralty stipulation in the sum of $400,000.00.

Filed admiralty stipulation in the sum of $400,000.00 for the release of property seized, with The Aetna Accident & Liability Co. and United States Fidelity & Guaranty Co. as sureties.

Filed appearance of respondent and claimant. [5]

July 11. Filed return of Southern Pacific Company to citation on order for foreign attachment, with original citation and return of U. S. Marshal attached thereto.

Proclamation was this day made and claimant given ten days to answer.

August 30. Ordered admiralty stipulation for the release of property be reduced to the sum of $200,000.00.

October 17. Filed stipulation that the amount of admiralty stipulation for the release of property may be reduced to $200,000.00.

Filed admiralty stipulation for release, in the sum of $200,000.00, with The Aetna Accident & Liability Co., and United States Fidelity & Guaranty Co. as sureties.

31. Filed answer of respondent and claimant with interrogatories attached.

December 12. Filed exceptions to answer and interrogatories.

1918.

March 2. Hearing was this day had on the exceptions to answer and interrogatories, before the Hon. M. T. Dooling, and was ordered submitted.

June 5. Filed stipulation that amount of admiralty stipulation for release may be reduced to $160,000.00.

Filed admiralty stipulation for release in the sum of $160,000.00 with The Aetna Casualty & Surety Co. and United States Fidelity &

29. Filed opinion (Hon. M. T. Dooling, Judge), in which it was ordered that the exceptions to answer and interrogatories be overruled.

July 31. Filed order cancelling bond for release executed October 17, 1916. [6]

August 28. Filed answers to interrogatories propounded to libelant.

1919.

May 15. Filed bond for release of property, in the sum of $160,000.00 with British American Bank as surety.

Filed stipulation and order that the above bond be substituted for the bond filed on June 5, 1918, and that said last named bond be cancelled.

July 7. Filed stipulation that order and stipulation filed May 15th, 1919, pertaining to substitution of bond for release, be set aside and annulled, and that the bond executed and filed June 5th, 1918, be continued and remain in full force and effect.

1920.

October 27. Filed notice, directed to respondent, to produce certain correspondence.

November 15. Filed two notices, directed to libelants, to produce certain documents, etc.

This cause came on this day for trial; the Honorable M. T. Dooling, Judge, presiding.

16. Filed notice, directed to libelant, to produce certain documents.

Trial was this day resumed.

17. Trial was this day resumed. Case continued to November 22, 1920, for argument.

22. The cause was argued and submitted.

27. Filed four volumes of testimony.

1921.

March 1. Filed opinion in which it was ordered that the libel be dismissed. [7]

May 4. Filed final decree.

26. Filed notice of appeal.

Filed assignment of errors.

It was this day ordered that the supersedeas bond on appeal be fixed in the sum of $20,000.00.

27. Filed supersedeas bond in the sum of $20,000.00 with Maryland Casualty Co. as surety.

June 2. Filed cost bond on appeal in the sum of $250.00 with Maryland Casualty Co. as surety. [8]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

Libel In Rem and In Personam.

To the Honorable MAURICE T. DOOLING, Judge of Said Court:

The libel of W. R. Grace & Co., a corporation, against the Ford Motor Company of Canada, Ltd., a corporation, and against Certain Automobiles and Parts, respectfully shows as follows:

I.

That W. R. Grace & Co. is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and is doing business as an exporter and carrier of merchandise at the port of San Francisco and various other ports of the world.

II.

That Ford Motor Company of Canada, Ltd., is a corporation organized and existing under and by virtue of the laws of Ontario, Dominion of Canada,

and is doing business as a manufacturer and shipper of automobiles.

III.

That on or about the 25th day of February, 1916, libelant W. R. Grace & Co. and respondent Ford Motor Company of Canada, Ltd., made and entered into a written contract wherein and whereby said [9] respondent agreed to deliver to libelant alongside the American steamship "Cacique" at San Francisco as fast as said vessel could load, otherwise shipper to pay demurrage at the rate of $3,000 per day, for shipment per said steamship to Australia, libelant to advise respondent more definitely as to exact loading date when said vessel should be closer to San Francisco, 6,200 tons (40 cubic feet each) automobiles and parts in packages, total shipment to weigh approximately 1550 tons (2240 pounds each) measuring about four to one; that respondent Ford Motor Company of Canada, Ltd., agreed to pay to libelant as freight therefor at the rate of $47.50 per 40 cubic feet measurement, said freight to be paid in advance; that respondent Ford Motor Company of Canada, Ltd., so agreed in consideration of the agreement of libelant to accept and ship by said vessel at said rate of freight from San Francisco to Australia, said 6200 tons (40 cubic feet each) automobiles and parts in packages, total shipment to weigh approximately 1550 tons (2240 pounds each) measuring about four to one.

IV.

That thereafter and on or about the 5th day of

June, 1916, libelant advised respondent Ford Motor Company of Canada, Ltd., that, as to the loading date aforesaid, said steamship "Cacique" would be ready for loading said 6200 tons of automobiles and parts in packages as per said contract of February 25, 1916, on the 27th day of June, 1916.

V.

That thereafter and on or about the 23d and 24th days of June, 1916, about 1100 packages consigned to order of respondent of automobiles and parts in packages, of wholly different description and bulk than required by and specified in said contract of February 25, 1916, were deposited by respondent Ford Motor Company of Canada, Ltd., on Pier 26, in the city and county of San Francisco, the wharf of libelant alongside of which said steamship "Cacique" was to dock, and that thereafter, on the 27th day of June, 1916, said [10] steamship "Cacique" arrived alongside of said dock and was in readiness to load said cargo described and specified in said contract of February 25, 1916.

VI.

That on the 23d and 26th days of June, 1916, said respondent Ford Motor Company of Canada, Ltd., in writing expressly refused to perform said contract of February 25, 1916, and advised and informed libelant that said respondent Ford Motor Company of Canada, Ltd., had forwarded 4075 odd tons of cargo for said steamship "Cacique" at an ocean freight rate of $47.50; that said amount of 4075 odd tons was the entire cargo that said respondent Ford Motor Company of Canada, Ltd., would forward for

said steamship, and that if libelant should attempt to hold said 4075 tons for freight for 6200 tons at said rate, said respondent Ford Motor Company of Canada, Ltd., would decline to load any of said cargo whatsoever.

VII.

That thereafter and on or about the 24th day of June, 1916, about 1100 packages consigned to order of respondent of automobiles and parts in packages, of wholly different description and bulk than required by and specified in said contract of February 25, 1916, having been deposited on said pier 26, libelant's wharf alongside of which said steamship "Cacique" was to dock, as aforesaid, and other automobiles and parts in packages, also of wholly different description and bulk than required by and specified in said contract of February 25, 1916, then and there in the possession or custody of the Southern Pacific Railway Company in the city and county of San Francisco, being in course of delivery on said wharf for shipment on said steamship, said respondent Ford Motor Company of Canada, Ltd., instructed said railway company not to make any further delivery thereof on said wharf of libelant, and instructed said railway company [11] to remove from said wharf such automobiles and parts in packages as had been theretofore delivered on the same, and wholly failed, neglected and refused to deliver any automobiles and parts in packages or otherwise in accordance with the terms and provisions of said contract of February 25, 1916, and wholly failed, neglected and refused to perform the

obligations of said contract by said respondent Ford Motor Company of Canada, Ltd., to be performed, and has ever since continued, and now continues to so fail, neglect and refuse.

VIII.

That said 1100 packages consigned to order of respondent of automobiles and parts in packages are now on the wharf of libelant, alongside of said steamship "Cacique," and ready for shipment thereon, and are within the Northern District of California and within the admiralty and maritime jurisdiction of this Honorable Court.

IX.

That libelant has duly performed all the terms and conditions and obligations of said contract on the part of libelant to be performed, except in so far as libelant has been prevented from so doing by the acts of said respondent Ford Motor Company of Canada, Ltd.

X.

That by reason of the premises, and on account of the failure, neglect and refusal of said respondent Ford Motor Company of Canada, Ltd., to deliver said 6200 tons of automobiles and parts in packages, or any part thereof, in accordance with the terms and provisions of said contract of February 25, 1916, and its failure, neglect and refusal to perform the obligations of said contract upon its part to be performed, libelant has suffered damages in the sum of $319,500.00, according to libelant's best present information and belief; that libelant is unable at the present moment to determine ac-

curately the amount of damage suffered by libelant, but verily [12] believes that the same will not be less than the above sum, and libelant prays that it be permitted hereafter to amend its libel by increasing the said amount, and to make the same accord with the actual damages sustained by libelant through said respondent's Ford Motor Company of Canada, Ltd., breach of said contract.

XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law according to the usage and custom of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said automobiles and parts aforesaid, now upon Pier 26, libelant's wharf in the city and county of San Francisco, State of California, and that all persons claiming any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid; and that said respondent Ford Motor Company of Canada, Ltd., a corporation, may be personally cited to appear and answer on oath all of the matters aforesaid; and that this Honorable Court will be pleased to decree the payment by respondents of the libelant's damages aforesaid, together with interest and costs, and that said automobiles and parts now on libelant's wharf in the city and county of San Francisco, State of California, may be condemned and sold to pay the same; and that if said respondent Ford Motor Company

of Canada, Ltd., cannot be found, then that the goods and chattels of such respondent in this District may be attached, and if goods and chattels belonging to said respondent cannot be found, then that the credits and effects of said respondent may be attached in the hands of any persons in whom the same may be found, and that such garnishee or garnishees may be cited to appear and answer on oath as to the credits and effects belonging to said respondent in their hands; and that libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive. [13]

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Libelant.

State of California,
City and County of San Francisco,—ss.

Gale H. Carter, being first duly sworn, deposes and says: That he is an officer of the libelant corporation, to wit, Sub-Manager thereof, and as such is authorized to make this verification in its behalf; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

GALE H. CARTER.

Subscribed and sworn to before me this 27 day of June, A. D. 1916.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

Let process issue as prayed.
June 27th, 1916.

M. T. DOOLING,
Judge of Said Court.

[Endorsed]: Filed Jun. 27, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

Claim of Ford Motor Company of Canada, Ltd. (to Property Seized in Rem).

To the Honorable M. T. DOOLING, Judge of the United States District Court for the Northern District of California:

The claim of Ford Motor Company of Canada, Ltd., a corporation, to eleven hundred (1100) pack-

ages of automobile parts heretofore seized by the United States Marshal for the Northern District of California, under process issuing *in rem* against said property, which said cargo is now in the custody of said marshal at the suit of W. R. Grace & Co., a corporation, under said process, alleges:

That it is the true and *bona fide* owner of the said property; that no other person is the owner thereof.

WHEREFORE, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to it and otherwise right and justice to administer in the premises. [15]

FORD MOTOR COMPANY OF CANADA, LTD.,

By L. C. DAVIS,
Traffic Mgr.

Northern District of California,—ss.

Subscribed and sworn to before me this 5th day of July, 1916.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

W. F. WILLIAMSON,
McCUTCHEN, OLNEY & WILLARD,
PILLSBURY, MADISON & SUTRO,
Proctors for Claimant.

[Endorsed]: Filed Jul. 5, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

Claim or Ford Motor Company of Canada, Ltd., (to Property Levied upon by Writ of Foreign Attachment).

To the Honorable M. T. DOOLING, Judge of the United States District Court for the Northern District of California:

The claim of Ford Motor Company of Canada, Ltd., a corporation, to all of the property except that owned by and heretofore claimed by Robert Nettlefold, and except eleven hundred (1100) packages of automobile parts seized under process *in rem* issuing out of the above-entitled court in said cause, which last-mentioned cargo has been claimed by this claimant and which said balance of said cargo is now in the custody of said marshal at the suit of W. R. Grace & Co., a corporation, under process of foreign corporation, alleges:

That it is the true and *bona fide* owner of the

said property; that no other person is the owner thereof.

WHEREFORE, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to it and otherwise right and justice to administer in the premises. [17]

FORD MOTOR COMPANY OF CANADA, LTD.,

By L. C. DAVIS,
Traffic Mgr.

Northern District of California,—ss.

Subscribed and sworn to before me this 5th day of July, 1916.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

W. F. WILLIAMSON,
McCUTCHEN, OLNEY & WILLARD,
PILLSBURY, MADISON & SUTRO,
Proctors for Claimant.

[Endorsed]: Filed Jul. 5, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

United States Marshal's Return (to Citation on Order for Foreign Attachment).

I CERTIFY that after due and diligent search and inquiry I am unable to find the within named respondent within the Northern District of California, and that in obedience to and under and by virtue of the within writ, I attached the goods and

chattels, which are described as follows and which were found within said Northern District of California, to wit: One hundred and eighty (180) cars of automobiles shipped by the Ford Motor Company of Canada, Limited, from Walkerville, Ontario, and consigned to the order of Ford Motor Company of Canada, Limited, or to W. R. Grace & Company at San Francisco, which cars moved over the lines of the Southern Pacific Company and connecting carriers to San Francisco, and all of said automobiles and parts contained in said shipment being at San Francisco and in the possession of said Southern Pacific Company with the exception of thirty (30) cars of automobiles which were delivered to W. R. Grace & Company at Pier 26, San Francisco; all of said automobiles and parts in packages being claimed by the Ford Motor Company of Canada, Limited, a corporation, and released by me upon said respondent furnishing a bond in the sum of four hundred thousand dollars, as appears from the records and files in the office of the clerk of said court.

J. B. HOLOHAN,
United States Marshal.
By Lawrence J. Conlon,
Office Deputy.

San Francisco, California, July 11, 1916. [19]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

Citation and Order for Foreign Attachment.

The President of the United States of America, to the Marshal of the Northern District of California, GREETING:

WHEREAS, a libel was filed in the District Court of the United States, in and for the Northern District of California, on the 27th day of June, in the year of our Lord one thousand nine hundred sixteen, by W. R. Grace & Co., a corporation, libelant, against the above-named respondent, Ford Motor Company of Canada, Ltd., in a certain cause of contract civil and maritime, for recovery of $319,500.00 damages alleged to have resulted to said libelant through the failure of said respondent to perform its duties and obligations under and by virtue of the terms of a certain agreement whereby said respondent agreed to ship certain merchandise from San Francisco to Australia on libelant's steamship "Cacique," to the damage of libelant in said sum of $319,500.00,

and praying that a citation may issue against said respondent pursuant to the rules and practice of this Court, and that the goods, chattels and credits of respondent in this District may be attached [20] to compel the respondent's attendance in case it cannot be found;

NOW, THEREFORE, we do hereby directly charge and empower and command you, the said marshal, that you warn said respondent Ford Motor Company of Canada, Ltd., if it shall be found in your District, to be before said District Court of the United States, at the Postoffice Building in the city and county of San Francisco, State of California, on the 11th day of July, A. D. 1916, at ten (10) o'clock A. M., then and there to answer the said libel and make its allegations in that behalf; and if said respondent cannot be found in your District, we command you that you attach its goods and chattels in your District to the amount sued for; and if sufficient goods and chattels cannot be found, then that the credits and effects of said respondent in the jurisdiction of this court may be attached, and that you cite the persons in whose hands or possession such credits and effects may be to appear and answer on oath as to such credits and effects in their hands belonging to said respondent; and have you then and there this writ with your return thereon.

WITNESS the Honorable MAURICE T. DOOLING, Judge of said Court, this 27th day of June,

in the year of our Lord one thousand nine hundred sixteen.

[Seal] W. B. MALING,
Clerk.
C. W. Calbreath,
Deputy Clerk U. S. District Court, Northern District of California.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Libelant. [21]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

Return of Southern Pacific Company to Citation and Order for Foreign Attachment and to Garnishment.

Now comes Southern Pacific Company, a corporation, organized and existing under and by virtue of laws of the State of Kentucky, and makes the following return to the citation and order for foreign attachment and to the garnishment heretofore

served upon it in the above-entitled proceedings, to wit:

Said respondent, Ford Motor Company of Canada, Ltd., caused to be shipped from Walkerville, Ontario, 180 cars of automobiles consigned to W. R. Grace & Co., at San Francisco, which said cars moved over the lines of Southern Pacific Company, and connecting carriers, to San Francisco, and all of the automobiles and parts contained in said shipments are now at San Francisco in the possession of said Southern Pacific Company, with the exception of 30 cars of automobiles which were delivered to W. R. Grace & Co., at Pier 26, San Francisco, and are now in the custody of the United States Marshal. A statement showing the [22] number and initials of the cars contained in said shipments, the contents, point of origin, waybill reference, point of destination, the party to whom notice of such shipments was to be given (said shipments moving under order bills of lading), and the steamer via which said shipments were to be transported from San Francisco, was filed with the marshal on June 28, 1916, and the same is hereby specifically referred to and made a part of this return.

Said Southern Pacific Company has in its possession no other property belonging to said Ford Motor Company of Canada, Ltd., nor is it indebted

to said Ford Motor Company of Canada, Ltd., in any sum or sums whatsoever.

SOUTHERN PACIFIC COMPANY,
By T. O. EDWARDS,
Assistant Secretary.

C. W. DURBROW,
FRANK B. AUSTIN,
Proctors for Southern Pacific Company.
[23]

State of California,
City and County of San Francisco,—ss.

T. O. Edwards, being first duly sworn, deposes and says:

That he is an officer, to wit, Assistant Secretary of Southern Pacific Company, a corporation, named in the foregoing return and that he is duly qualified and authorized to make this verification for and on behalf of said corporation; that he has read the foregoing return to the citation and order for foreign attachment and garnishment and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

T. O. EDWARDS.

Subscribed and sworn to before me this 6th day of July, 1916.

[Seal] HUGH T. SIME,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD.,
Claimant.

Answer.

To the Honorable the Judges of the United States District Court, for the Northern District of California:

The answer of Ford Motor Company of Canada, Ltd., a corporation, claimant and respondent herein, to the libel of W. R. Grace & Co., a corporation, libelant herein, admits, denies and alleges as follows:

I.

Claimant and respondent admits the allegations of Article I of said libel.

II.

Claimant and respondent admits the allegations

III.

Answering unto the allegations of Article III of said libel, claimant and respondent denies that said allegations correctly set forth the terms and conditions of any contract between libelant and claimant and respondent entered into on or about the 25th day of February, 1916, or at any other time; and in that behalf alleges that libelant and claimant and respondent, on and about the 25th day of February, 1916, entered into a contract for the shipment per [25] libelant's American S. S. "Cacique" of a quantity of automobiles and parts from San Francisco to Wellington, New Zealand and/or Sydney, Australia, which contract in its complete terms and conditions was as set forth in that certain copy thereof attached hereto, marked Exhibit "A," and hereby made a part of this answer with the same force and effect as though pleaded at length herein.

IV.

Claimant and respondent denies the allegations of Article IV of said libel, but in that behalf alleges that prior to the 1st day of June, 1916, and at divers times, libelant gave claimant and respondent notice of earlier loading dates in the month of June, and thereafter, and on or about the 6th day of June, 1916, gave unto Ford Motor Company of San Francisco, California, that certain notice set forth in a copy thereof attached hereto, marked Exhibit "B," and hereby made a part of this answer with the same force and effect as though pleaded at length herein.

V.

Answering unto the allegations of Article V of said libel, claimant and respondent admits that thereafter and on or about the 23d and 24th days of June, 1916, approximately 1115 packages, weighing about 1500 tons, consigned to the order of claimant and respondent, of automobiles and parts in packages, were deposited by claimant and respondent, Ford Motor Company of Canada, Ltd., on Pier No. 26 in the city and county of San Francisco, the wharf of libelant, alongside of which said steamship "Cacique" was to dock, and that thereafter, and on the 27th day of June, 1916, said steamship "Cacique" arrived alongside of said dock. Claimant and respondent denies, however, that said 1115 packages were of wholly different description and bulk than required by and specified in the aforesaid contract of February 25th, 1916, and denies that the said steamship "Cacique" was on the 27th day of June, 1916, in readiness to load said cargo described and specified in said contract of [26] February 25th, 1916; and in that behalf, claimant and respondent alleges that while said steamship "Cacique" berthed at said wharf during the forenoon of said 27th day of June, 1916, she was not in readiness to load said cargo as she was then fully loaded with inward cargo from Oriental ports, discharge of which was not completed until the 8th day of July, 1916, and she was also unfumigated and in an unseaworthy state, and was not, in fact, thereafter in readiness to load until the 12th day of July, 1916, following a drydocking at Hunter's Point Dry-

dock and the partial completing of repairs to hull and machinery necessary to place her in a fit and seaworthy condition for the prosecution of her outward voyage, all as hereinafter more specifically alleged.

VI.

Claimant and respondent denies that on the 23d and 26th days of June, 1916, or at any other time, respondent, Ford Motor Company of Canada, Ltd., in writing, or otherwise, expressly refused to perform said contract of February 25th, 1916, or that, otherwise than as hereinafter expressly stated, it advised or informed libelant that respondent, Ford Motor Company of Canada, Ltd., had forwarded 4075 odd tons of cargo for said steamship "Cacique" at an ocean freight of $47.50 per ton, or that said amount of 4075 odd tons was the entire cargo that said respondent, Ford Motor Company of Canada, Ltd., would forward for said steamship, or that if libelant should attempt to hold said 4075 odd tons for freight for 6200 tons at said rate, said respondent, Ford Motor Company of Canada, Ltd., would decline to load any of said cargo whatsoever; and in that behalf claimant and respondent alleges that on or about June 1st, 1916, it notified libelant, by letter, that in addition to the 4075 tons, it had effected an arrangement with the Union Steamship Company to transfer to libelant 1500 tons of the tonnage then on the coast originally contemplated to go forward [27] by Union Steamships, and that it understood that libelant had let 524 tons additional, making 6099 tons all told out of the 6200

tons allotted to claimant and respondent, and that said letter and the above arrangement was without prejudice to claimant and respondent's rights to contend that any engagement purporting to have been entered into on its behalf had not been carried out by libelant, in that such an engagement called for June loading, which in the parlance must necessarily mean June shipping, whereas, claimant and respondent understood that the steamer "Cacique" would not leave San Francisco on its outward voyage until about the 10th day of July, 1916, although it had previously been advised that the said S. S. "Cacique" would leave on June 24th, 1916, and again on June 14th, 1916, and that claimant and respondent's plans were all laid with this in view and that the sailing date of July 10th had materially disturbed them, and it, therefore, wanted it definitely understood that, if by reason of the above, or other circumstances, claimant and respondent's plans for supplying 6200 tons for said vessel did not carry through, it did not consider its obligation binding, a copy of which letter and notice is hereby attached, marked Exhibit "C," and hereby made a part of this answer with the same force and effect as though pleaded at length herein; and claimant and respondent further in that behalf alleges that on the 14th day of June, 1916, it addressed another letter and notice to libelant, wherein it gave notice, *inter alia,* that it had forwarded 4075 tons of cargo for libelant's steamship "Cacique" at an ocean freight of $47.50, and that this was the entire cargo that it would forward for this vessel, and was the

cargo that libelant had been informed from time to time would be forwarded for said vessel, and that if libelant wished to accept said cargo, it was at liberty [28] to do so on those terms, but if libelant took the attitude that there was a contract binding upon claimant and respondent for 6200 tons space, and attempted to hold said 4075 tons of cargo for freight for 6200 tons at the above rate, claimant and respondent would decline to load any of the cargo whatever, and that it was not necessary for claimant and respondent to go into the details for the reasons moving it, and that libelant must have misunderstood claimant and respondent's previous letter, to wit, that of June 1st, 1916, as said letter was designed to show in an argumentative way that if there was a contract for 6200 tons binding upon claimant and respondent, which never had been admitted, but had always been denied, such contract was inoperative by reason of the fact that libelant's steamer "Cacique" had already taken out a clearance for July 5th, instead of loading and clearing in June, and that said shipment of 4075 tons quantity, on the basis outlined above, would be ready and alongside libelant's steamer on June 27th, as indicated by libelant, a copy of which letter and notice is hereby attached, marked Exhibit "D," and hereby made a part of this answer with the same force and effect as though pleaded at length herein.

VII.

Answering unto the allegations in Article VII of said libel, claimant and respondent denies that thereafter, and on or about the 24th day of June,

1916, or after 1100 packages consigned to the order of claimant and respondent of automobiles and parts in packages had been deposited on said Pier No. 26, libelant's wharf, alongside of which said S. S. "Cacique" was to dock, or after other automobiles and parts in packages, or while said automobiles and parts in packages were then and there in the possession and custody of the Southern Pacific Railroad Company, in the city and county of San Francisco, or in course of delivery on said wharf for shipment [29] on said steamship, or at any other time, said claimant and respondent, Ford Motor Company of Canada, Ltd., instructed said Railway Company not to make any further delivery of said automobiles and parts in packages on said wharf of libelant, or instructed said Railway Company to remove from said wharf such automobiles and parts in packages as had been theretofore delivered on the same; and denies that the said 1115 packages so deposited on said Pier No. 26, or other, or any automobiles and parts in packages then and there in the possession or custody of the Southern Pacific Company, or in course of delivery on said wharf for shipment on said S. S. "Cacique" were wholly or at all of different description or bulk than required by and specified in the said contract of February 25, 1916; and in that behalf claimant and respondent alleges that the said Southern Pacific Company, on the 23d and 24th days of June, 1916, delivered into the custody of libelant, on Pier No. 26 approximately 1115 packages of automobiles and parts, in packages, measuring approximately 1500 tons, for

shipment on said steamship "Cacique"; that said packages were receipted for and delivery thereof acknowledged and acted upon by libelant by its filing its libel *in rem* herein against said packages and by causing the same to be attached by process issuing out of this court in this action; that at the time of said delivery to libelant, said steamship "Cacique" had not arrived in the port of San Francisco on her inward voyage from Oriental ports, and at said time a strike of stevedores was prevailing along the wharves in the harbor of San Francisco, and particularly against libelant herein; that on the 24th day of June, 1916, claimant and respondent, being advised that the delivery of any more of said cargo on said pier would endanger the safety of said cargo at the hands of strikers, and that the surrender by the Southern Pacific Company of possession of said cargo under the circumstances might [30] entail great loss to claimant and respondent in the event that said automobiles and parts were destroyed by fire after they had left the possession of said railroad company on said wharf and prior to being loaded on the said steamer "Cacique" when in readiness and in fit condition to load the same, and having no definite assurances from libelant as to the date when said cargo would be loaded upon the said steamship "Cacique," then instructed said Southern Pacific Company not to make further deliveries to libelant until notified so to do by claimant and respondent, and that it was necessary that said Railway Company should retake into its possession the portions of said cargo

already delivered, which, in fact, was not done, or attempted to be done, by said Company; that said cargo remained in possession of libelant until taken into custody by the United States marshal, pursuant to process issuing in this cause.

Claimant and respondent denies that it wholly, or at all, failed or neglected or refused to deliver any automobiles and parts in packages, or otherwise, in accordance with the terms and provisions of said contract of February 25th, 1916, and denies that it wholly or at all failed, or neglected, or refused to perform the obligations of said contract by it to be performed, and denies that it has ever since, or at all, continued, or that it now continues, so to fail, or neglect or refuse.

VIII.

Answering unto the allegations in Article VIII of said libel, claimant and respondent admits that said 1100 packages, consigned to order of respondent, of automobiles and parts in packages, were, at the time of the filing of said libel, on the wharf of libelant, alongside said steamship "Cacique," and in the possession of libelant, and were within the Northern District of California, and within the admiralty and maritime jurisdiction of this [31] Honorable Court, as they were then in the possession of libelant in part performance by claimant and respondent of said agreement of February 25th, 1916; and admits that said packages were ready for shipment on said steamship "Cacique" if and when the same should be loaded by libelant on said

Steamer in accordance with said agreement of February 25th, 1916.

IX.

Answering unto the allegations in Article IX of said libel, claimant and respondent denies that libelant has performed all or any of the terms, conditions and obligations of said contract on its part to be performed, and denies that libelant has been prevented from so doing by the acts, or any acts of claimant and respondent, Ford Motor Company of Canada, Ltd.

X.

Claimant and respondent denies each and every of the allegations in Article X of said libel.

XI.

Answering unto the allegations in Article XI of said libel, claimant and respondent denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this Honorable Court.

AND, further answering unto the allegations of said libel, claimant and respondent alleges:

I.

That claimant and respondent, having sold a large quantity of automobiles for delivery in New Zealand and Australia, actual shipment of which by water was required to be made during the month of June, and having been advised by libelant that libelant's steamship "Cacique" would sail from the port of San Francisco early in the month of June, and that said automobiles could be carried on said steamer, entered into that certain contract [32]

with libelant, a copy of which is hereto attached, marked Exhibit "A," and hereby made a part of this Answer with the same force and effect as though pleaded at length herein, wherein and whereby claimant and respondent agreed to ship, and libelant agreed to load and transport, on board said S. S. "Cacique," in the month of June, 1916, 6200 tons (40 cubic feet each) of automobiles and parts in packages, at a freight rate of $47.50 per ton, 40 cubic feet measurement, freight prepaid, from San Francisco to Wellington, New Zealand, and/or Sydney, Australia.

II.

That subsequent to the execution of said agreement, libelant named to claimant and respondent June 14th and then June 24th, 1916, as the sailing dates of said S. S. "Cacique" from San Francisco, and subsequent thereto and before June 1st, 1916, advised claimant and respondent that said sailing date had been postponed beyond the month of June, as required by said contract, until the 10th day of July, 1916, and thereupon, on June 1st, 1916, claimant and respondent wrote libelant that certain letter, a copy of which is hereby attached, marked Exhibit "C," and hereby made a part of this answer with the same force and effect as though pleaded at length herein, wherein and whereby it notified libelant of the quantity of tonnage which it would have available for shipment under said contract, and advising it that such arrangement was without prejudice to claimant and respondent's rights to contend that any engagement purporting

to have been entered into on its behalf had not been carried out by libelant, in that such engagement called for June loading, which in the parlance must necessarily have meant June shipping, whereas it was then understood that said S. S. "Cacique" would not leave the port of San Francisco until about the 10th of July, 1916, and advising libelant that claimant and respondent's plans were all laid with the view to a June 24th sailing, and that the sailing date [33] of July 10th had materially disturbed them, and definitely advising libelant that if by reason of the above or other circumstances claimant and respondent's plans for shipping 6200 tons on said vessel did not carry through, it did not consider its obligation binding.

That in response to said letter, libelant wrote claimant and respondent under date of June 6th, 1916, a copy of which letter is hereby attached, marked Exhibit "B" and hereby made a part of this answer with the same force and effect as though herein pleaded at length, noting surprise at claimant and respondent's remarks on the subject of June loading, and disagreeing with the contention which the latter reserved, but libelant failed and neglected to advise claimant and respondent in said letter that said steamer "Cacique" would load and sail during the month of June, as required by said agreement, and thereupon and thereafter, to wit, on the 14th day of June, 1916, claimant and respondent addressed a second letter to libelant, a copy of which is hereby attached, marked Exhibit "D," and hereby made a part of this answer with

the same force and effect as though pleaded at length herein, notifying libelant that any arrangements which the latter had made for 6200 tons were effected through the Ford Motor Company of San Francisco, which arrangements it did not and never had considered binding upon claimant and respondent, and which information it had previously given libelant, and then repeated, and further advised libelant that it had forwarded 4075 tons of cargo for its S. S. "Cacique" at an ocean freight rate of $47.50, and that this was the entire cargo that it had been informed would be forwarded for such vessel, and that if libelant wished to accept said cargo it was at liberty to do so on those terms, and that if it took the attitude that there was a contract binding upon claimant and [34] respondent for 6200 tons space and attempted to hold said 4075 tons of cargo for freight for 6200 tons at the above rate, it would decline to load any of the cargo whatever, and further advised libelant that it was not necessary for it, claimant and respondent, to go into details for the reasons moving it, and that libelant must have misunderstood its previous letter upon the subject, and that such letter was designed simply to show in an argumentative way that had there been a contract for 6200 tons binding upon claimant and respondent, which had never been admitted but had always been denied, such contract was inoperative by reason of the fact that its S. S. "Cacique" had already taken out a clearance for July 5th instead of loading and clearing in June, and that on the basis outlined above

its shipment of 4075 tons quantity would be ready and alongside said Steamer on June 27th, as indicated by libelant.

III.

That thereafter and on or about the 23d and 24th days of June, 1916, the Southern Pacific Company delivered into the custody of libelant approximately 1115 packages of automobiles and parts, part of the said shipment required by said contract of February 25th, 1916, at Pier No. 26, in the harbor of San Francisco, which pier libelant had designated as the pier at which its said S. S. "Cacique" would load; that at said time a strike of stevedores prevailed on the wharves in the harbor of San Francisco, and particularly against libelant, and thereupon claimant and respondent, fearing possible damage to its said packages of automobiles and parts from fire and violence, and not knowing whether said S. S. "Cacique," which had not then arrived in the port of San Francisco, would be able to load and sail with said cargo during the month of June, as required by said contract of February 25th, 1916, or June 24th, 1916, requested said Southern [35] Pacific Company to delay further deliveries until instructed by claimant and respondent to make them, and to retake into its possession the said packages previously delivered to libelant; that said Southern Pacific Company, however, did not retake or attempt to retake said 1115 packages, or any thereof, from the custody of libelant, and thereafter, and on the 26th day of June, 1916, libelant sent to claimant and respondent a telegram,

which was delivered to claimant and respondent in the forenoon of the 27th day of June, 1916, wherein libelant advised claimant and respondent that said libelant stood strictly upon said contract of February 25th, 1916, and insisted upon fulfillment thereof by claimant and respondent and further advised that libelant was ready to perform all its obligations under said contract and would take such quantities of automobiles as were delivered to it and would hold claimant and respondent responsible for damages and demurrage under said contract, and that by taking a smaller quantity of automobiles than the amount provided in said contract libelant did not accept such smaller quantity as a full satisfaction of said contract of February 25th, 1916, but as partial satisfaction thereof, and that by the acceptance of such smaller quantity libelant did not in any way release or waive any claim for damages or demurrage due under said contract; and thereafter, on said 27th day of June, 1916, and prior to the filing of the libel herein, the said S. S. "Cacique" having arrived at the port of San Francisco on that day and having berthed at said Pier No. 26, claimant and respondent withdrew its said order and request to the Southern Pacific Company.

IV.

That said S. S. "Cacique" arrived in the port of San Francisco on the morning of June 27th, 1916, and during the forenoon of said day docked at said Pier No. 26; that claimant and respondent [36]

be, that said S. S. "Cacique" was then loaded with a cargo of merchandise approximating 7900 tons transported from Oriental ports to said port of San Francisco; that upon said docking at said pier said steamship commenced the unloading of said cargo, and continued the same during days and nights, and finally completed discharge thereof late in the afternoon on the 8th day of July, 1916.

V.

That on the afternoon of said 27th day of June, 1916, and at or about the hour of four o'clock thereof, libelant filed its libel herein, and immediately had issued out of this court the process prayed for in said libel, and under and by virtue thereof immediately caused to be attached said 1115 packages of automobiles and parts which had been delivered to it by said Southern Pacific Company, as hereinbefore alleged, and also approximately 4500 tons of automobiles and parts belonging to claimant and respondent and in the possession of the Southern Pacific Company; that thereafter, on the following day, to wit, the 28th day of June, 1916, libelant notified claimant and respondent by telegram and letter, a copy of which telegram is hereto attached, marked Exhibit "E," and hereby made a part of this answer with the same force and effect as though pleaded at length herein, that said S. S. "Cacique" was then ready to load said cargo on June 27th, 1916, at nine P. M. That said cargo, however, was, on said 27th day of June, 1916, at said hour of nine o'clock P. M. in the custody and the exclusive control of the United States Marshal for

the Northern District of California, under said process issued out of the above-entitled court at the instance of libelant; that if the loading of said cargo did not commence at the time when libelant gave notice of the readiness of said steamship to load the same, it was due to the act of libelant in attaching said cargo, as aforesaid, and [37] by reason of the further fact that said steamship was then loaded with her inward cargo, and was, as hereafter more specifically alleged in an unseaworthy and unfit condition to load claimant's and respondent's cargo for her outward voyage.

VI.

That at the time of the arrival of said S. S. "Cacique" in the harbor of San Francisco on said 27th day of June, 1916, she was in an unseaworthy condition for her outward voyage, so claimant and respondent is informed and believes, and therefore alleges the fact to be, in that a plate on each side of her stem in No. 6 strake below the sheerstrake was cracked along a vertical line for about 20 inches; in that several gusset plates on each side of No. 2 bottom tank, attached to the top of the tank margins, were leaking and required re-riveting; in that the center line bulkhead of the deep tank was strained and started at the riveting and caulking and a large number of rivets were loose; in that the wood in the lower half of the stern bushing was hammered and broken and parts thereof were missing; and in that other repairs were required upon her boilers, hull and machinery not fully known to

claimant and respondent and as to which it demands a full disclosure thereof.

VII.

That to make said vessel seaworthy and to repair the damages to said steamer existing on her arrival in the port of San Francisco, as aforesaid, it was necessary to drydock her at Hunter's Point Drydock; that said drydocking was done on the evening of said 8th day of July, 1916, immediately following the completion of the discharge of her inward cargo; that she remained on said drydock until the 12th day of July, 1916, and during the period of such drydocking, partial repairs to the aforesaid injuries were made, and to effect the same, some of [38] the tanks of said steamer were, and particularly No. 2 tank was, thoroughly steamed out and cleaned so as to make it safe against the danger of fire and explosion for the workmen to cut out and renew the plates and rivets required in making said repairs; that to admit of access to the stern bushing and to repair the same, the propeller of said steamship was removed and the tail-shaft drawn.

VIII.

That immediately upon being discharged from said drydock and, in fact, before the completion of all the repairs on the hull, boiler and machinery of said steamer, she was taken to Pier 39 in the harbor of San Francisco, where, on the 12th day of July, 1916, she commenced the loading of cargo for her outward voyage, and continued said loading from day to day until the same was completed on the 26th day of July, and thereafter, upon the following day,

said steamer sailed on her voyage to the ports of New Zealand and Australia; that while said steamship was loading her outward cargo at Pier 39 and until about the 20th day of July, 1916, machinists and ironworkers were working, days and nights, making repairs on the hull, boilers and machinery of said steamship.

IX.

Respondent is informed and believes, and so alleges the fact to be, that prior to the arrival of said steamship in the port of San Francisco, and certainly on her arrival, libelant was fully advised of the damaged condition of said vessel, and of her unfit and unseaworthy condition to carry claimant and respondent's cargo, as agreed in and by said contract of February 25th, 1916, and knew that it was impossible to load said cargo during the month of June and that said steamer would have to drydock to undergo the repairs which were, in fact, made upon her; that notwithstanding such knowledge, libelant at no time [39] disclosed the fact of said damages and of the unfit and unseaworthy condition of said steamer to claimant and respondent, but despite the fact that it knew that compliance on its part with the terms and conditions of said contract of February 25th, 1916, was impossible, demanded the delivery into its custody of claimant and respondent's cargo, and peremptorily commenced this action for an alleged breach of said contract and on the 28th day of June, 1916, demanded demurrage on said steamship at the rate of Three Thousand Dollars ($3,000.00) per day at a

time when it had not, and could not, by reason of the fact that said steamship "Cacique" had just arrived in port fully loaded with inward cargo and in an unfit and unseaworthy condition, perform the terms and conditions of said agreement of February 25th, 1916, on its part to be performed and also notwithstanding the fact that said libelant did not load or attempt to load any outward cargo on said steamship until the 12th day of July, 1916.

X.

That libelant has not and did not duly, or at all, perform all or any of the terms, or conditions, or obligations of the said contract of February 25th, 1916, on its part to be performed.

XI.

That all and singular the premises are true.

WHEREFORE, claimant and respondent prays that libelant take nothing by this action, that said libel be dismissed, that claimant and respondent have and recover its costs herein expended and for such other and further relief as to the Court may seem meet and equitable in the premises.

W. F. WILLIAMSON,
IRA A. CAMPBELL,
OSCAR SUTRO,

Proctors for Claimant and Respondent, Ford Motor Company of Canada, Ltd. [40]

State of California,
City and County of San Francisco,
Northern District of California,—ss.

W. F. Williamson, being duly sworn, on oath says:

That he is one of the proctors for the claimant and respondent, Ford Motor Company of Canada, Ltd.; that said claimant and respondent maintains no office and has no agent in the Northern District of California, and for that reason he makes this verification for and in behalf of said claimant and respondent; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

W. F. WILLIAMSON.

Subscribed and sworn to before me this 31st day of October, 1916.

[Seal] HERBERT BENNETT,

Notary Public in and for the City and County of San Francisco, State of California. [41]

Exhibit "A."

San Francisco, February 25th, 1916.

Ford Motor Company,
San Francisco, Cal.,

Gentlemen:

Attention Mr. L. C. Davis.

We confirm freighting engagement as follows:

COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

DATE: $47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

SHIPMENT: Per American SS. "Cacique" June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3000.00 per day.

Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

Yours very truly,
W. R. GRACE & CO.
(Sgd.) H. E. MOORE,
Traffic Manager.

Accepted:
(Sgd.) FORD MOTOR CO. OF CANADA, LTD.
By L. C. DAVIS. [42]

Exhibit "B."

San Francisco, June 6, 1916.

Ford Motor Co. of Canada, Limited,
Ford, Ontario.

Gentlemen:

Referring to your letter of June 1st, we are glad to note that you have now arranged for 6099 tons out of the 6200 tons allotted to you and we hope that you will be able to supply the remaining tonnage.

We note with surprise your remarks on the subject of June loading and, of course, do not agree with the contention which you reserve. We certainly cannot understand how, if you were not able to sup-

ply the agreed tonnage by a later date, your plans to supply it at an earlier date could have been disturbed and will accomplish our contract in accordance with its terms.

We enclose copy of our letter of today's date to Mr. Davis of your San Francisco office, from which you will note that shipment must be alongside our vessel on June 27th ready for loading as fast as ship can receive in accordance with our contract of February 25th.

Yours very truly,
W. R. GRACE & COMPANY. [43]

Exhibit "C."

June 1, 1916.

Messrs. W. R. Grace & Company,
332 Pine Street,
San Francisco, Cal.

Gentlemen:

We refer to your letter of May 25th.

You have already had detailed reply to your wire of the 18th mentioned in your letter.

Permit us to repeat the information we have already given you with reference to the tonnage for the S. S. "Cacique" by ports as follows:

	Cubic Feet.	Tons.
Adelaide	8,323.91	208.10
Brisbane	16,342.79	408.57
Fremantle	10,014.40	250.38
Hobart	3,421.75	85.54
Melbourne	42,301.99	1,057.55

Sydney	30,455.25	761.38
Wellington	47,503.12	1,187.58
Parts (4 carloads)	4,622.00	116.00
Total	162,985.21	4,075.00

In addition we have affected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the Coast originally contemplated to go forward by Union Steamships.

We understand that you have let 524 tons additional making 6099 tons all told out of the 6200 tons alloted to us.

This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf, has not been carried out by yourselves, in that, such an engagement calls for June loading, which in the parlance must necessarily mean June shipping, whereas we understand the Steamer Cacique will not leave until about the tenth of July.

We have been advised by Mr. Davis, Traffic Manager for Ford Motor Company, San Francisco, that the S. S. Cacique would leave on June 24th and again advised that it would leave on June 14th. Our plans were all laid with this in view, and your sailing date of July 10th has materially disturbed them.

We wish it, therefore, definitely understood that if by reason of the above and other circumstances, our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding; in fact, we have so stated to Mr. Davis in

all of our correspondence to him and we presume he has given you ample notice to this effect.

Yours very truly,

FORD MOTOR COMPANY OF CANADA, LIMITED,

Sales Department.

HSP–LS. [44]

Exhibit "D."

June 14th, 1916.

Messrs. W. R. Grace & Co.,
332 Pine Street,
San Francisco, Cal.

Gentlemen:

We refer to your letter of June 6th.

Any arrangements that you have made for 6200 tons were effected through Ford Motor Company of San Francisco, which arrangements we do not, and never have considered binding upon this Company, and which information we have previously given you and now repeat.

We have forwarded 4075 odd tons of cargo for your S. S. "Cacique" at an ocean freight rate of $47.50. This is the entire cargo that we will forward for the vessel, and is the cargo that you have been informed from time to time would be forwarded for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this Company for 6200 tons space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate we will decline to load any of the cargo whatever.

It is not necessary for us to go into details for the reasons moving us. You have misunderstood our previous letter upon this subject. That letter was designed to simply show in an argumentative way, that had there been a contract for 6200 tons binding upon this Company, which has never been admitted, but has always been denied, such contract was inoperative by reason of the fact, that your S. S. "Cacique" has already taken out a clearance for July 5th instead of loading and clearing in June.

Our shipments of the 4075 ton quantity, on the basis outlined above, will be ready and alongside your steamer on June 27th as indicated by you.

Yours very truly,

FORD MOTOR COMPANY OF CANADA, LIMITED,

Sales Department.

HSP/LS. [45]

Exhibit "E."

TELEGRAM.

San Francisco, Cal., June 28–16.

Ford Motor Co.

Ford.

Please take notice that in accordance with our previous advices the Steamship Cacique was ready to load your cargo contracted for on February 25th, 1916, one June 27th, 1916, at 9 P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of three

thousand dollars $3000.00 per day commences on the day and at the hour last mentioned.

W. R. GRACE & CO.

328 PM.
HSP. [46]

Interrogatories Propounded to Libelant Under the Thirty-Second Admiralty Rule.

1. What injuries were suffered by the SS. "Cacique" on her voyage from San Francisco to Hongkong via Vladivostok which included the month of April, 1916?
2. How and when were they incurred?
3. Were there any entries made in the log-books of the steamer respecting such injuries?
4. If so, what were the injuries described in the log-books and when were they suffered? Attach a copy thereof to your answer.
5. Were there any reports made at Vladivostok or Hongkong in May, 1916, respecting said injuries?
6. If so, what were the injuries to said steamer described in said reports and on what dates were said injuries suffered? Attach a copy of such reports to your answer.
7. Was the steamer drydocked either at Vladivostok or at Hongkong on the voyage in question?
8. If so, what repairs were made to her at either or both of said ports, and on what dates were the injuries so repaired suffered?

9. On the voyage from Hongkong to San Francisco on which she arrived at the latter port on the 27th day of June, 1916, what injuries did she suffer to hull and/or machinery and particularly where did said vessel spring a leak on said voyage?
10. What day and hour thereof did said steamer dock in the port of San Francisco in the month of June, 1916, on arrival on her said voyage from Hongkong? [47]
11. On what day and hour did she commence the discharge of her cargo?
12. Of what did her cargo consist?
13. What quantities and kinds of cargo were stowed in each of the different cargo compartments of said steamer?
14. What quantities and kinds of cargo were discharged from each cargo compartment of said steamer during each of the days intervening between the time when she commenced discharging in June, 1916, and final discharge was completed?
15. What was the total quantity of said cargo discharged from said steamer on each of the days during which said cargo was unloaded?
16. Was the steamer working night and day discharging cargo from the time she commenced discharging until the unloading was completed?
17. On what day was final discharge of all of the cargo completed?

18. On what day were arrangements made by libelant for the drydocking of said steamer at the Hunter's Point drydock?
19. On what day, and hour thereof, was she drydocked in July, 1916?
20. On what day, and hour thereof, was she discharged from said drydock?
21. What repairs were made upon said steamer while upon said drydock?
22. How large was the crack in the plates on each side of the stem?
23. In what strakes below the sheerstrakes were the cracks located?
24. Where did the water go which leaked into the hull of said steamer through said cracks?
25. How many gusset plates in said steamer on each side of No. 2 bottom tank required caulking or repair because leaking where they were attached to the top of the tank margins? [48]
26. What was the defective condition which existed at the time of said drydocking in the center line bulkhead of the deep tank?
27. Was it not strained and started at the riveting and caulking?
28. How and when did it become so strained?
29. Were not a large number of rivets found to be loose therein?
30. What repairs or replacements were made upon or about the center line bulkhead of the deep tank at the time of said drydocking or subsequent thereto?

31. Was the tail-shaft drawn for examination during said drydocking?
32. What damage was found on drydocking to exist in the stern bearings or stern tube?
33. Was not the stern-bush found to be hammered, and was it not renewed?
34. In what way did the damage referred to in the last two interrogatories evidence itself before said vessel was drydocked?
35. What repairs were made upon the boilers of said steamer while she was in the port of San Francisco in July and/or August?
36. On what days were such repairs made?
37. Before the tanks could be examined and/or repairs thereto made, was it not necessary to clean the fuel oil out of said tanks and to steam the same so as to eliminate the gases?
38. What tanks were cleaned and steamed before repairs were made to the steamer?
39. Was not a certificate required from a chemist showing an analysis of the air in the holds and/or tanks of the steamer before the workmen would enter the ship for the purpose of examining and/or repairing said steamer?
40. If said certificate was given, what did it certify to, and on what dates was it furnished, and by whom? [49]
41. In the examination and/or repair of said tanks were not exposed lights, or heated rivets or steel tools used from which there might be danger of an explosion, if any gas had been left in the tanks?

42. Was not this the reason for requiring the cleaning of the tanks and the procuring of the chemical analysis of the air?
43. If not, what was the reason?
44. What repairs were effected to the steamer after she left the drydock?
45. On what day did she begin loading her cargo for the next voyage outward from San Francisco?
46. What were the quantities and kinds of cargo which were loaded in the ship day by day?
47. Where in the various compartments of said steamer were the different packages shipped by respondent stowed? In describing stowage, refer to the packages by their marks.
48. What were the names of the shippers of cargo loaded for said outward voyage?
49. On what day in July was the loading of said steamer completed?
50. How much and what cargo loaded on said steamship "Cacique" for said outward voyage was contracted for by libelant prior to June 26th, 1916.
51. How much and what cargo loaded on said steamship for said outward voyage was contracted for by libelant subsequent to the last named date?
52. What, if any, effort did libelant make to obtain cargo for said steamship for said outward voyage between the 5th and 26th days of June, 1916? [50]

53. What, if any, cargo for the said outward voyage of said steamship was offered to libelant between the 5th day of June and the 25th day of July, 1916?

54. On what day after the arrival of said steamer in the port of San Francisco on June 27, 1916, and after the discharge of her inward cargo, was said steamer fumigated?

55. Who did the fumigating?

56. What chemical was used in fumigating?

57. Did the steamer undergo, while in port, any survey by a surveyor of Lloyds' Register of British and Foreign Shipping?

58. If so, did such surveyor make report of the injuries which he found to exist in said steamer and of the repairs and replacements which were to be made upon said steamer?

59. If so, what were such findings of injuries, repairs and replacements required by him? Attach a copy of such survey reports to your answers.

60. Did said steamer undergo any classification survey while in the port of San Francisco and/or on said drydock? If so what?

61. Was not the drawing of said tail-shaft a part of said classification survey?

W. F. WILLIAMSON,
IRA A. CAMPBELL,
OSCAR SUTRO,

Proctors for Claimant and Respondent Ford Motor Company of Canada, Ltd.

[Endorsed]: Receipt of a copy of the within answer is hereby admitted this 31st day of October, 1916.

ANDROS & HENGSTLER.
GOLDEN W. BELL.

Filed Oct. 31, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [51]

In the District Court of the United States for the Northern District of California.

No. 16,058.

W. R. GRACE, a Corporation,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,

Respondents.

FORD MOTOR COMPANY OF CANADA, LTD.,

Claimant.

Exceptions to the Answer and Interrogatories of Respondent and Claimant.

To the Honorable Judges of the United States District Court for the Northern District of California:

W. R. Grace & Co., libelant herein, hereby excepts to the answer and interrogatories of Ford Motor Company of Canada, Ltd., on the following grounds,

I.

That the allegations on page 3 of said answer, beginning on line 12 thereof with the words: "discharge of which" and ending on line 20 thereof with the word "alleged," are insufficient, incompetent, immaterial and irrelevant, do not constitute a defense to the libel, and should be expunged, being allegations of supposed facts alleged to have occurred after respondent had given notice to libelant that it refused to perform its contract and after it had in fact refused to perform the same. [52]

II.

That the allegations on page 6 of said answer, beginning on line 24 thereof with the words: "that said packages were receipted for," and ending on line 28 thereof with the words: "this action," should be expunged, the same being mere argument and false conclusions of law, and otherwise insufficient, incompetent, immaterial and irrelevant.

III.

That the allegations on pages 6 and 7 of said answer, beginning on line 30 of page 6 with the words: "and at said time," and ending on line 12 of page 7 with the words: "would be loaded upon the said steamship 'Cacique,' " should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and do not constitute a defense to the libel, in so far as they are a statement of the supposed reasons moving respondent to its action, and it appearing from the facts pleaded in the answer and libel that said supposed reasons were not the full

or true reasons for its instructions to said Southern Pacific Company.

IV.

That the allegations on pages 8 and 9 of said answer, reading as follows: "actual shipment of which by water was required to be made during the month of June," should be expunged, the same being uncertain as to who made said requirement, and being insufficient, incompetent, immaterial and irrelevant under the issues of this cause and do not constitute a defense to the libel.

V.

That the allegations on page 9 of said answer, beginning on line 8 with the words "wherein and whereby," and ending on line 14 with the words "Australia," should be expunged, the same being an attempted construction of a contract set forth verbatim in said answer, and being an obviously false construction of said contract. [53]

VI.

That the allegations on pages 11 and 12 of said answer, beginning on line 29 of page 11, with the words: "that at said time a strike," and ending on line 5 of page 12 with the words: "on June 24th, 1916," should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and do not constitute a defense to the libel in so far as they are a statement of the supposed reasons moving respondent to its action, and it appearing from the facts pleaded in the answer and libel that said supposed reasons were not the full or true reasons for

its instructions to the said Southern Pacific Company.

VII.

That the allegations on pages 12 and 13 of said answer, beginning on line 28 of page 12 with the words: "and thereafter," and ending on line 1 of page 13 with the words, "Southern Pacific Company," should be expunged, the same being insufficient, incompetent, immaterial, and irrelevant, and do not constitute a defense to the libel, in so far as the facts alleged, if true, occurred after respondent had given notice to libelant that it refused to perform its contract, and after it had in fact refused to perform the same.

VIII.

That the allegations on page 13 of the answer, beginning on line 5 with the words: "that claimant and respondent," and extending through the rest of said Article IV, should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and do not constitute a defense to the libel, in being allegations of supposed facts alleged to have occurred after respondent had given notice that it refused to perform its contract, and after it had in fact refused to perform the same.

IX.

That the allegations on pages 13 and 14 of said answer, beginning on line 22 of page 13 with the words "and also approximately," [54] and ending on line 9 of page 14 with the words: "outward voyage," should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and

do not constitute a defense to the libel, in that, in so far as the same are allegations of facts, they state facts alleged to have occurred after respondent had notified libelant that it refused to perform its contract, and after it had, in fact, refused to perform the same, and after the libel in this cause had been filed, in so far as said allegations are merely hypothetical and argumentative they are objectionable on that ground.

X.

That the allegations in Article VI, on page 14 of said answer, and the whole of said Article, should be expunged, the same being insufficient, incompetent, immaterial, irrelevant, and do not constitute a defense to the libel, and the facts alleged, if true, having occurred after respondent had notified libelant that it refused to perform its contract, and after it had in fact refused to perform the same.

XI.

That the allegations in Articles VII, VIII and IX, on pages 14 to 16 of said answer, and the whole of each of said articles, should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and not constituting a defense to the libel, and the facts therein alleged being alleged to have occurred after respondent had notified libelant that it refused to perform its contract, and after it had in fact refused to perform the same, and after the libel in this cause had been filed. [55]

Exceptions to Interrogatories Propounded to Libelant.

Libelant excepts to the interrogatories propounded by respondent as follows:

I.

Excepts to Interrogatories 1 to 9, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues in this cause; and that the same are impertinent.

II.

Excepts to Interrogatories 11 to 44, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues of this cause; and that the same are impertinent.

III.

Excepts to Interrogatories 45 to 51, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues of this cause, and that the same are impertinent.

IV.

Excepts to Interrogatory 53 for the same reason as stated in the exceptions to the previous interrogatories herein excepted to, in so far as the said Interrogatory 53 inquires for cargo offered to libelant after the 26th day of June, 1916; but libelant admits

the propriety of said interrogatory if the same is confined to the period between the 5th day of June and the 26th day of June, 1916.

V.

Excepts to Interrogatories 54 to 61, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into [56] matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues in this cause, and that the same are impertinent.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Libelant.

[Endorsed]: Due service and receipt of a copy of the within exceptions to answer, etc., is hereby admitted this 11th day of December, 1916.

W. F. WILLIAMSON,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant.

Filed Dec. 12, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,058.

W. R. GRACE & CO.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., etc.,

Respondent.

(Opinion—Overruling Exceptions.)

ANDROS & HENGSTLER and GOLDEN W. BELL, Esq., Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD, Proctors for Respondent.

The libel herein is for damages for alleged breach of contract to furnish cargo for shipment by libelant's steamship "Cacique" from San Francisco to Australia. The contract, made in February, 1916, provided that such cargo should be for shipment "per American S. S. 'Cacique,' June loading; when vessel closer at hand, will advise you definitely as to exact loading date."

Respondent claims that "June loading" means that the vessel was to sail in June. Libelant claims that it means that the loading should be commenced in June. In any event, libelant finally advised respondent that the vessel would be ready to receive the cargo on June 27th. Before that day, that is to

say, on June 23, the libel avers that respondent repudiated the contract and advised libelant that no cargo would be loaded thereunder. This alleged repudiation was accompanied by a statement to the effect that respondent would furnish a materially less quantity of cargo than the contract called for, if libelant would accept it and not hold it responsible for the larger cargo contracted for. [58]

On June 27, this libel was filed and the cargo offered was attached under it for breach of the contract to furnish the full amount. The answer sets up that on June 27 the vessel docked from its Oriental voyage and had on board a full inward cargo, discharge of which was not completed until July 8th, and that she was not, because of this fact, and the further fact that she needed repairs, in readiness to take on cargo before July 12. The answer also contains a number of interrogatories bearing upon these facts. The libelant excepts to those portions of the answer, and to all the interrogatories tending to throw any light on them, the theory being that anything occurring after respondent repudiated the contract is not material and is no defense to the libel.

The foregoing is not intended as any complete or detailed statement of the facts pleaded either in the libel or the answer, but only as a broad statement which will sufficiently present the questions involved in the exceptions.

It is quite true that after the renunciation of a contract by one party, the other may consider himself absolved from any future performance of it,

and may sue at once for damages for the anticipatory breach. His right of action accrues at once, but this does not mean that the amount of damages which he may recover may not be affected by after occurrences.

He is entitled to recover for such breach only the damages actually suffered by him because of it. The amount recoverable is not intended as a penalty imposed upon the defaulting party, but as compensation to the other for the damages actually sustained. If no damage results to him either directly or proximately from the breach, then there can be no recovery other than a nominal one. [59]

If in the instant case the contract was renounced by respondent on June 23, as claimed by libelant, and thereafter and on June 26, before the date set for loading, the "Cacique" had sunk, although libelant's right of action accrued on June 23, I am of the opinion that it could not recover, as manifestly the renunciation of the contact would have caused it no damage, because of its own inability to perform due to a cause wholly independent of such renunciation.

The true rule is that a party who has renounced his contract is liable at once to an action for the breach, and that whatever arises afterwards or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages.

The rule is stated in Roehm vs. Horst, 178 U. S. 1, as follows:

> "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

This does not mean that the party not in default must tender performance, and prepare to perform, before he may recover from the defaulting party. It does mean, however, that the defaulting party may show in defense to an action for an anticipatory breach that the other party has suffered no damage therefrom, because of absolute and insurmountable disability on his own part to perform.

If therefore in the present action respondent can show that libelant could not for insurmountable physical reasons have performed its contract, it seems to me, that while its right of action [60] accrued upon respondent's renunciation, the real damage suffered by it because of such renunciation would be governed by the after-occurrences.

As the answer and interrogatories have a direct bearing upon this question, the exceptions will be overruled, and the whole matter left open to be determined upon the trial.

M. T. DOOLING,
Judge.

June 29th, 1918.

[Endorsed]: Filed Jun. 29, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [61]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,058.

W. R. GRACE & CO.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., etc.,

Respondent.

Answers of W. R. Grace & Co., a Corporation, Libelant, to the Interrogatories Propounded by Respondents.

1. Answer to Interrogatory No. 1: Damage on Fore Deck: to center plate of breakwater; to hood of stairway leading to shelter deck; to port and starboard hawse pipes and chain pipes; to bed of windlass; to frame of port winch; to exhaust pipes, and to air and sounding pipe. On After Deck: to steam pipe connections. In Lower Hold No. 2: to fuel oil bulkhead, and shell plates. In Engine Room: to discharge pipe for bilges and oil transfer pump; to crank pin for intermediate engine.
2. Answer to Interrogatory No. 2: Through very heavy weather between April 7th and May 1st, 1916.

3. Answer to Interrogatory No. 3: Yes.
4. Answer to Interrogatory No. 4: April 10th: Hatch batten to No. 1 hatch washed away.
 April 11th:) Considerable damage to gear
 April 12th:) about decks, etc., as specified in
 April 13th:) answer to Interrogatory No. 1.
 April 18/25th: Damage to machinery as specified in answer to Interrogatory No. 1: Tanks strained and leaking.
 Extract of Captain's log attached and marked Exhibit "A."
5. Answer to Interrogatory No. 5: Yes, at both places.
6. Answer to Interrogatory No. 6: Report of Survey at Vladivostok attached and marked Exhibit "B"; Report of Survey at Hongkong attached and marked Exhibit "C."
 The interrogatory is answered by Exhibits "A," "B" and "C." [62]
7. Answer to Interrogatory No. 7: The steamer was drydocked at Hongkong.
8. Answer to Interrogatory No. 8: Deck and machinery damage, as shown in the above answers and reports, was repaired; the deep tank was made tight by caulking and riveting. Temporary repairs were made on tanks in No. 2 hold. The dates on which the injuries so repaired were suffered appear in the previous answers, and in particular in Exhibit "A."
9. Answer to Interrogatory No. 9: One plate on each side of the stem in 6th strake below

sheer strake cracked in a vertical direction for about twenty inches. Rivets of six gusset plates on each side of No. 2 double bottom tank started and leaking. Centerline bulkhead of deep tank started and leaking, a large number of rivets being loose. Wood in lower half of stern bush hammered, four pieces of the wood broken and part missing. Leak in forepeak.

10. Answer to Interrogatory No. 10: At 7:30 A. M. on June 27th, 1916.
11. Answer to Interrogatory No. 11: Immediately after arrival at her dock.
12. Answer to Interrogatory No. 12: Chinese merchandise.
13. Answer to Interrogatory No. 13: The kinds, respective quantities and distribution of the cargo are shown in the stowage plan attached hereto and marked Exhibit "D."
14. Answer to Interrogatory No. 14: There is no record in existence; it is therefore not possible to answer this question.
15. Answer to Interrogatory No. 15: There is no record in existence; it is therefore not possible to answer this question for each day of the discharge. An approximate calculation of the average discharge per day gives 643 tons. The actual discharge was slow and intermittent, on account of the prevailing strike of longshoremen and the consequent necessity of employing incompetent nonunion labor. Had there been no strike, and compe-

tent stevedores available, the steamer could have been completely discharged before June 30th.

16. Answer to Interrogatory No. 16: No.
17. Answer to Interrogatory No. 17: On July 8th, 1916.
18. Answer to Interrogatory No. 18: On July 8th, 1916.
19. Answer to Interrogatory No. 19: On July 8th, 1916, about 6 P. M.
20. Answer to Interrogatory No. 20: On July 11th, 1916, at 6 P. M.
21. Answer to Interrogatory No. 21: The two fractured plates at stem were renewed. The gusset plates in No. 2 tank were re-riveted and caulked. The riveting of the centerline bulkhead was renewed, and caulking overhauled and made good. The wood in lower half of sternbush was renewed, tail-shaft replaced, propeller refitted and secured. [63]
22. Answer to Interrogatory No. 22: About twenty inches long.
23. Answer to Interrogatory No. 23: In 6th strake below sheer strake.
24. Answer to Interrogatory No. 24: Into the forepeak tank.
25. Answer to Interrogatory No. 25: Six gusset plates were riveted.
26. Answer to Interrogatory No. 26: It was strained and started at the riveting and caulking.

28. Answer to Interrogatory No. 28: Impossible to answer with certainty, except by inference from facts stated in preceding answers.
29. Answer to Interrogatory No. 29: Yes.
30. Answer to Interrogatory No. 30: Answered in answer to Interrogatory 21.
31. Answer to Interrogatory No. 31: Yes.
32. Answer to Interrogatory No. 32: The wood in lower half of stern-bush hammered, four pieces of the wood broken and part missing.
33. Answer to Interrogatory No. 33: Yes.
34. Answer to Interrogatory No. 34: Have no knowledge as to whether there was any evidence of the damage before it was discovered in drydock.
35. Answer to Interrogatory No. 35: No repairs.
36. Answer to Interrogatory No. 36: None were made.
37. Answer to Interrogatory No. 37: Yes.
38. Answer to Interrogatory No. 38: Deep tanks, forepeak tanks, No. 2 double bottom tanks.
39. Answer to Interrogatory No. 39: Yes.
40. Answer to Interrogatory No. 40: Copies of the certificates are attached hereto marked Exhibit "E," which said copies answer the interrogatory.
41. Answer to Interrogatory No. 41: Yes.
42. Answer to Interrogatory No. 42: Yes.
43. Answer to Interrogatory No. 43: ———.
44. Answer to Interrogatory No. 44: Usual minor overhauling while vessel was loading. [64]

45. Answer to Interrogatory No. 45: On July 12th, at 9 A. M.
46. Answer to Interrogatory No. 46: No record in existence; hence cannot answer.
47. Answer to Interrogatory No. 47: They were stowed as in the annexed stowage plan marked Exhibit "F."
48. Answer to Interrogatory No. 48: San Francisco Sulphur Co., Cudahy Packing Co., Atchison, Topeka & Santa Fe Ry., Western Pacific Ry., Southern Pacific Ry., General Roofing Co., Petroleum Products Co., Winslow Bros. & Smith Co., Cameron Bros., San Francisco Sulphur Co., Shell Oil Co. of California, Illinois Pacific Glass Co., Macondray & Co., W. R. Grace & Co., California Paint Co., W. P. Fuller & Co., John Dunn Son & Co., Ford Motor Car Co., Grant Powder Co., American Trading Co., E. I. dupont De Nemours.
49. Answer to Interrogatory No. 49: July 26th.
50. Answer to Interrogatory No. 50: 6200 tons for respondent's autos, 2358.5 tons for outsiders.
51. Answer to Interrogatory No. 51: 1121 tons, of which 500 tons was deck cargo.
52. Answer to Interrogatory No. 52: No effort.
53. Answer to Interrogatory No. 53: Cannot say, as records do not show any.
54. Answer to Interrogatory No. 54: July 11th.
55. Answer to Interrogatory No. 55: A United States quarantine official.

56. Answer to Interrogatory No. 56: Cyanide and sulphuric acid.
57. Answer to Interrogatory No. 57: Yes.
58. Answer to Interrogatory No. 58: Yes.
59. Answer to Interrogatory No. 59: As appears by copy of survey report attached, marked Exhibit "G."
60. Answer to Interrogatory No. 60: Yes, the annual survey of boilers.
61. Answer to Interrogatory No. 61: No. [65]

City and County of San Francisco,
Northern District of California,—ss.

Gale H. Carter, having made the foregoing answers on behalf of libelant W. R. Grace & Co., and being sworn, says: That the said answers to the interrogatories propounded by respondents are true to the best of his knowledge and belief.

GALE H. CARTER.

Sworn to before me this 26th day of August, 1918.
[Seal] S. I. CLARK,
Notary Public in and for the City and County of San Francisco, State of California. [66]

Exhibit "A."

ABSTRACT OF LOG

Covering Heavy Weather Damage.

ABSTRACT OF LOG S. S. "CACIQUE" ON VOYAGE FROM MEJILLONES, CHILE, TO VLADIVOSTOCK, RUSSIA, VIA TOCOPILLO, CHILE, VIA PAYTA, PERU, VIA SAN FRANCISCO, CALIFORNIA, UNITED STATES OF AMERICA.

Arrived at Mejillones, Chile, from Santos, Brazil, February 25th, 1916. Loaded 5000 tons Nitrate. Finished loading Nitrate and sailed Monday, March 6th, 1916, for Tocopillo for fuel oil.

Arrived at Tocopillo and received fuel oil and sailed March 7th, 1916, for Payta, Peru, for fuel oil.

Arrived Payta, Peru, Sunday March 12th, 1916. Received fuel oil and sailed for San Francisco 7:40 P. M. March 12th, 1916.

Arrived at San Francisco, Tuesday, March 28th, and commenced discharging coffee from Santos, Brazil, and load cotton and machinery for Vladivostock, Russia. Ship's draught sailing: Forward 27′ 08″; Aft 27′ 04″.

Tuesday April 4th, 1916, finished loading cargo for Vladivostock and sailed April 5th A. M. Weather condition sailing fine and clear, with fresh N. W. breeze force 5 BOUF. scale choppy N. Wly. sea.

April 6th: Fair weather, mod. sea, breeze and swell;

April 7th: Cloudy and overcast, large head swell. Choppy sea, vessel shipping large quantities of water over forward decks. Ship pitching and laboring heavy.

April 8th: Fresh Sly. breeze with confused rough sea and heavy Wly. swell. Vessel rolling and pitching and laboring heavy. Shipping heavy seas over decks continually.

April 9th: Overcast, misty with strong W. S. W. breeze, heavy sea and swell. Vessel pitching, rolling and laboring heavy. Shipping heavy seas over decks continually.

April 10th: Moderate S. W. gale with mountainous head sea and swell. Vessel straining and laboring and pitching heavy, engine slowed down 6:20 A. M., boarded heavy head sea washing away hatch batten to No. 1 Hatch. Ship under dead slow speed. Seaman O. Howard injured by sea boarded ship while securing No. 1 Hatch. Ship hove to. Damage to cargo unknown. 8:00 o'clock hatch secured, ship proceeding ahead slow. Decks flooded continually.

April 11th: Heavy S. Wly. gale force 9, ship hove to. Vessel rolling, pitching, laboring, and straining heavy. Shipping heavy seas on decks continually doing considerable damage to gear about decks, carrying away breakwater fastenings bending exhaust pipes to steam winch lines, bending pipe guards, carrying away vent pipe to No. 2 double bottom tank. Carried top tarpaulin to No. 1 Hatch.

Broke plug-cock on exhaust line, bending and breaking valve to steam fire extinguishers line to No. 2 Hold. Decks flooded continually. Heavy snow and hail squalls. [67]

#2

ABSTRACT OF LOG—Cont'd.

April 12th: Strong S. W. gale, heavy mountainous high sea and swell, vessel straining and groaning and laboring heavy. Shipping heavy seas over deck, doing considerable damages about decks, straining plates under Hawser pipes, causing heavy leak to fore peak, found 3 ft. of water in fore peak store room, scupper pipes broken and plugged. Carried away cover to sounding pipe to No. 1 bilge, causing water to leak through deck. Discharge pipe from bilge pump carried away. Decks flooded continually.

April 13th: Tremendous heavy Wesly. Snow and hail squalls, accompanied by mountainous high sea and swell. Vessel pitching, rolling and laboring and straining heavy, shipping tremendous seas on decks. Found discharge pipe to oil transfer pump strained and leaking. Steering gear chains strained and stretched. Decks flooded continually. Engines racing heavy.

April 14th: Squally weather heavy sea and swell. Vessel pitching, rolling and laboring heavy. Shipping heavy seas over decks continually.

April 15th: Cloudy and overcast. Fresh N. W. gale, heavy sea and swell, vessel pitching, rolling and laboring very heavy. Straining, shipping

heavy seas over decks, engines racing heavy during pitching, sea increasing.

April 16th: First part of the day partly clear, later heavy overcast with increasing force of wind and sea. Vessel pitching and rolling and laboring continuously, shipping heavy seas over decks. Engines racing continually, vessel straining, deck flooded, boarding large heavy seas.

April 17th: Cloudy and overcast. Fresh breezes, squally heavy sea and swell. Vessel pitching and laboring heavy, shipping, heavy seas over decks continually, vessel straining.

April 18th: Squally stormy weather, vessel pitching and laboring very heavy mountain high seas and swell. Vessel racing continually 7:18 A. M. stopped engine. Found one set of crank pin brasses broke and parting piece for crank pin brasses cracked. Engineers making repairs. 12:03 P. M. repairs to engines completed. Continued slow and a half speed ahead. Sounding of bilges showed oil and water in No. 2 bilges, both sides bilge pumps working continually.

April 19th: Squally weather. Wind, sea and swell moderating gradually; vessel shipping water on deck at intervals. Bilge pump working continuously.

April 20th: At 6:45 A. M. sounding of bilges showed No. 2 port bilge 4 ft.; and no 2 starboard 1 ft. 8 in. consisted of oil and water. Bilge and auxiliary pumps working continuously. Fine weather, smooth sea, small swell. Bilge pumps working throughout. At 6:00 P. M. sounding

showed No. 2 port bilge 4 ft. .03 in. a gain of 4 inches during 12 hours. Thick oil mixed with water, apparently leak from deep tank due to straining of ship.

April 22nd: Fair weather, small sea and swell. Six o'clock sounding of bilges, found No. 2 port bilge containing 4 ft. 6 in. of water and oil, pumps working continuously. [68]

#3.

ABSTRACT OF LOG—Cont'd.

April 23d: Overcast misty weather, gentle Wly. winds, moderate sea and swell increasing. Bilges sounding showed No. 2 port bilge 4 inches, starboard 7″, pumps taking care of water.

April 24th: Cloudy overcast weather, choppy sea increasing, moderate Wsly. swell increasing, occasional snow squalls. Sounding of bilges showed No. 2 port 1 ft. 7 in. starboard 4″. Pumps working at regular intervals.

April 25th: Fine weather throughout, gentle sea and swell. Soundings of bilges showed No. 2 port 1 ft. 8″, starboard 1 ft. 7″, oil and water. Pumps working at regular intervals.

April 26th: From fine clear weather to moderate Wsly. gale, with heavy sea and swell. Vessel plunging and laboring heavy. Shipping heavy seas over decks. Bending and breaking steam pipe to No. 4 winch. Pumps working on bilges continually. Sounding of bilges not obtained on account of heavy weather.

April 27th: Heavy gale from westward with force of 10. Mountain high seas and swell. Vessel

plunging, rolling and laboring very heavy. Shipping large volume of water over decks. Decks flooded continuously. Bilge pumps working throughout. Ship hove to, part of time. No soundings of bilges obtainable on account of heavy weather.

April 28th: Weather moderating throughout. Sea and swell gradually moderating. Vessel shipping water on deck at intervals. Sounding of bilges showed No. 2 port 1 ft. 6 in. starboard 1 ft. 1 in. Pumps working continually.

April 29th: Clear and fine first part, later cloudy, overcast and misty with fresh S. W. wind and increasing choppy sea and swell. Bilge pumps working at regular intervals. Sounding of port bilges not obtainable on account of heavy seas. No. 2 starboard 2 inches.

April 30th: Misty drizzling weather, gentle sea, swell and breezes. Soundings of bilges showed No. 2 Port 1 ft. 4". No. 2 Starboard, 1 ft. 4". Pumps working at intervals.

May 1st: Fine weather throughout, smooth sea. 9:25 P. M. ship anchored outside of Vladivostock, entrance to Harbor.

(Copy.) [69]

Exhibit "B."

REPORT OF SURVEY—VLADIVOSTOK.

At the request of Messrs. Butterfield & Swire, Acting Lloyd's Agents at the port of Vladivostock we, the undersigned, proceeded on board the steamship "Cacique" of New York, 4543 tons net register, which left San Francisco on 5th April, 1916, arriving at Vladivostock on 2d May, 1916, with a general

cargo in order to survey damage to steamer said to have been incurred on the voyage.

We found as follows:

FORE DECK.

Center plate of breakwater, rivets started and broken away from the hood of stairway loading to shelter deck.

Port and starboard hawse pipes leaking very badly.

Port and starboard chain pipes leaking very badly.

Bed of windlass loose.

Frame of port winch cracked.

Exhaust pipes on fore deck leading to winches bent badly and drain cock carried away.

Air pipe broken and stay carried away in way of foremast.

Sounding pipe broken in way of mast port side.

AFTER DECK.

Steam pipe connections to No. 4 winch broken.

LOWER HOLD No. 2.

Found a large quantity of fuel oil among lower tiers of cargo and bilges on both sides full of oil. Many rivets started and leaking from fuel oil bulkhead tank. Several rivets in shell plates leaking in port wing.

ENGINE-ROOM.

Discharge pipe for bilges broken, discharge pipes for oil transfer pump leaking badly in joints. Crank-pin for intermediate engine and brasses scored badly.

There is evidence of fuel bulkhead having been

wing near the turn of bilges.

We recommend the steamer to proceed to a port to be dry-docked for examination of bottom and further examination of damage. The steamer having encountered very heavy weather on voyage, in our opinion the above damage was thereby sustained. For further particulars see Log Book. The steamer

Port of Survey—Vladivostok—Cont'd.

is in a [70] seaworthy condition to proceed to any port in China or Japan to execute repairs.

In witness whereof we have drawn up and signed this survey report at Vladivostok this day, 28/12th, May, 1916.

P. J. GREGGANS,
Superintendent Panama and Far Eastern Lines.
G. H. BAIDING (Signed),
Master Mariner.

At the request of Messrs. Bryner Kousnetzoff & Co., Agents for the American Steamer "Cacique," we have appointed the above P. J. Greggans and H. Baiding to survey and report upon alleged damage to the above mentioned steamer "Cacique," and we believe full confidence may be placed in their report.

Without prejudice to Underwriters' interests.

Vladivostock, 28/12th, May, 1916.

Per pro. BUTTERFIELD & SWIRE,
(Signed) J. W. TAYLOR,
Acting Lloyd's Agents.

Survey Fee: Rbls. 300.

Received—P. J. GREGGANS.
G. H. BAIDING,
Master Mariner.

(Copy.) [71]

Exhibit "C."

(Copy.)

REPORT OF SURVEY—HONGKONG.

Hongkong, May 25th, 1916.

THIS IS TO CERTIFY that

JOHN LAMBERT,

the undersigned surveyor to this Society, did at the request of Messrs. Gilman & Co., Lloyd's Agents, proceed on board of the American Screw Steamer "Cacique" of New York, No. 64 in the Register Book, J. E. Miller, Master, vessel lying afloat in Hongkong Harbor, for the purpose of ascertaining the nature and extent of damage stated to have been sustained to the vessel through encountering bad weather in the Pacific Ocean, whilst on a voyage from San Francisco to Vladivostok, where vessel arrived with considerable deck damage and damage to cargo, which is stated to have been occasioned by fuel oil leaking from deep tank and/or double bottom tank in No. 2 Hold, the deck damage being surveyed at Vladivostock and reported by Lloyd's Agents at that port; for further particulars see Log Book, Vladivostock Surveyor's report and report as follows:

On receiving a report on board as to the condition of vessel, it was decided that an examination be made in drydock, the vessel being subsequently placed in Taikoo Dock, which showed no damage to bottom or shell plating except a few rivets started which required caulking or removal.

On examination of No. 2 hold and deep tank, it was recommended that all ceiling be lifted, and all casing removed from bulkhead of deep tank, the deep tank tested by a head of water twelve feet above crown of tank, and that the double bottom tank in way of No. 2 Hold be tested. Ceiling was saturated with fuel oil.

The following deck damage was also found:

Breakwater started from its fastenings to companionway hood.

Port and starboard hawse pipes started and leaking badly into fore peak.

Port and starboard chain pipes started and leaking badly into chain locker.

Windlass started and bed of windlass loose.

Frame of port winch cracked.

Fore deck exhaust pipe damaged.

Air pipe and stay at foremast carried away.

Two sounding pipes at foremast broken.

After deck steam pipes damaged.

One bilge discharge pipe broken.

Oil pipes started and broken.

A number of scupper pipes broken.

No. 1 hatch tarpaulin damaged and hatch cleat broken.

No. 2 HOLD.

On lifting ceiling and cleaning up the hold it was found that a hole three or four inches long and about an inch wide was made in tank top plating in hatchway space as if some [72] heavy weight,

#2

Report of Survey—Hongkong—Cont'd.

such as a plate or perhaps hatch beam had been dropped and also on putting a pressure on the double bottom tank, a number of leaks were found at tank side brackets.

On removing casing at bulkhead of deep tank it was found that a number of rivets, seams and stiffeners were leaking.

MACHINERY.

Bilge discharge pipe broken and a number of oil connection pipes started.

Intermediate pressure crank-pin brass damaged.

RECOMMENDATIONS.

The No. 2 Hold be cleaned and coated and new ceiling laid. The double bottom tank being full of fuel oil it was recommended that a plate be fitted over hole as a temporary repair tapped on, until a permanent repair could be made.

On testing tank and finding side brackets leaking and there being no time to do the repairs, it was decided that the repairs to same might be postponed to a convenient opportunity provided no oil or water be carried in No. 2 double bottom tank until repairs be effected and tank retested.

That the deep tank be made tight, by renewing rivets and caulking seams as found necessary and tank again tested on completion of repairs.

DECK DAMAGE.

Breakwater to be repaired by renewing the rivets at companionway hood.

Port and starboard hawse pipes taken out and refitted and fore peak cleaned and coated.

Port and starboard chain pipes to be refastened and chain locker recoated.

Windlass to be lifted, bed renewed and windlass refastened.

Frame of port winch to be repaired.

Foredeck exhaust pipes to be repaired.

Air pipe and stay at foremast to be renewed.

Two sounding pipes to be repaired.

After deck steam pipes to be repaired.

One bilge discharge pipe to be repaired.

Oil suction and discharge pipe to be overhauled and repaired as found necessary.

A number of scupper pipes to be repaired.

No. 1 Hatch tarpaulin to be renewed and hatch cleat renewed.

A quantity of dunnage wood and mats destroyed to be renewed.

MACHINERY.

Bilge discharge pipe and oil fuel pipes to be repaired.

Intermediate pressure crank pin brass to be remetalled.

(Signed) JOHN LAMBERT,
Surveyor to Lloyd's Register, Hongkong. [73]

#3.

Report of Survey—Hongkong—Cont'd.

We, the undersigned Agents for Lloyd's, hereby certify that we have employed Mr. John Lambert to survey and report upon the S. S. "Cacique," and

believe that full confidence may be placed in his report.

Hongkong, 29th May, 1916.

(Signed) GILMAN & CO.,
Lloyd's Agents. [74]

FINAL REPORT OF SURVEY—HONGKONG.

Hongkong, May 25, 1916.

CONTINUATION OF DAMAGE REPORT DATED MAY 25, 1916.

All the repairs enumerated in Mr. Lambert's damage report dated May 25th have now been done to his and/or my satisfaction, except the No. 2 double bottom tank which requires to be permanently repaired and tested before oil or water is carried in this compartment, and replacing of wood casing on the bulkhead of deep tank, which is to be replaced on ship's arrival at Shanghai.

The No. 2 hold may be recoated at owners' convenience.

Attached is a memo of oil stated to have been lost, signed by master and officers.

(Signed) FINLAY MILLER,
Acting Surveyor to Lloyd's Register,
Hongkong.

We, the undersigned, Agents for Lloyd's, hereby certify that we have employed Mr. J. Finlay Miller to Survey and report upon the S. S. "Cacique" and believe that full confidence may be placed in his report.

FEE for Survey and Report—$425.

Hongkong, 29th May, 1916.

(Signed) GILMAN & CO.,
Lloyd's Agents.

(Copy.) [75]

Exhibit "E."

San Francisco, July 3, 1916.
9:30 A. M. Pier 26.

I hereby certify that ————
————deep tanks————
————Port and Starboard————
————Starboard
————Port
on the S. S. "Cacique"————were this day inspected————by me and found to contain no explosive gaseous mixture only————
Safe for riveting as noted below.
————Safe for men to work in. No naked lights permitted.
————Must be blown out before riveting.
————Blowers must be kept running during riveting.
————Contain Oil; need further cleaning.
Remarks: ————Deep tanks and bilgers must be thoroughly cleaned with blowers running
————

BRYANT S. DRAKE,
Chemical Engineer. ETF.

(Copy.) [76]

San Francisco, July 10th, 1916.
9:30 A. M.

I hereby certify that tanks————forepeak
————Port and Starboard
————Starboard
————Port
on the S. S. "Cacique"————was this day inspected by me and found to contain no explosive gaseous mixture.
Fore peak Safe for riveting as noted below.
Fore peak Safe for men to work in. No naked lights permitted.
Fore peak must be blown out before riveting.
#2 Double Bottoms Contain Oil; need further cleaning.
Remarks: ————

BRYANT S. DRAKE,
Chemical Engineer. [77]

San Francisco, July 11th, 1916.
9:30 A. M.

I hereby certify that tanks————
#2 double bottoms————Port and Starboard
————
————Starboard
————Port
on the S. S. "Cacique"———— was this day inspected by me and found to contain no explosive gaseous mixture.
————all————Safe for riveting as noted below.
————all————Safe for men to work in.

————all————Blowers should be kept running during riveting.

Remarks: ————

BRYANT S. DRAKE,
Chemical Engineer. [78]

Exhibit "G."

REPORT OF SURVEY—SAN FRANCISCO
HEAVY WEATHER DAMAGE

San Francisco, 2d August, 1916.

THIS IS TO CERTIFY THAT
JOSEPH S. BLACKETT,

the undersigned Surveyor to this Society did at the request of Messrs. W. R. Grace & Company, Owners of the Steel Screw Steamer "Cacique" of New York, 6202 tons gross register, make further examination of the said vessel in order to ascertain the nature and extent of damage stated to have been sustained through encountering heavy weather in April, 1916, while on a voyage from San Francisco to Hongkong via Vladivostock. For particulars, see Log-books and special damage reports issued and dated Vladivostok, May 12th, 1916, and Hongkong May 25th, 1916.

It appears that after the vessel left Hongkong on her return to San Francisco a leak developed in the fore peak, and recommendations were made by the undersigned for vessel to drydock for examination. On July 10th and subsequent dates while the vessel was lying on drydock and afloat at this

port with the tail shaft drawn as recommended the undersigned upon examination found:

One plate on each side of stem in 6th strake below sheerstrake cracked, the cracks in each case extending in a vertical direction for about 20 inches.

The rivetting of six gusset plates on each side of No. 2 double bottom tank where attached to top of tank margins started and leaking.

The centerline bulkhead of deep tank strained and started at the rivetting and caulking, a large number of rivets there being very loose.

The wood in lower half of stern-bush hammered and four pieces of the wood broken and part missing.

RECOMMENDED:

The vessel's bottom to be cleaned and painted.

Both fractured plates at stem to be cut out and renewed.

No. 2 tank to be thoroughly steamed out, the leaking gusset plates to be rivetted and caulked and tank afterwards tested to rule requirements.

The deep tank to be thoroughly steamed out and the whole of the rivetting of centerline bulkhead to be cut out and renewed and caulking overhauled and made good, the center line to be tested with water on completion of repairs.

The wood in lower half of stern-bush to be renewed, tail-shaft replaced, propeller refitted and secured.

These repairs have now been completed to my satisfaction.

(Signed) J. S. BLACKETT,
Surveyor to Lloyd's Register.

(Copy.) [79]

[Endorsed]: Due service and receipt of a copy of the within answers to interrogatories is hereby admitted this twenty-sixth day of August, 1918.

W. F. WILLIAMSON,
IRA A. CAMPBELL,
Proctors for Respondent.

Filed Aug. 28, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

(Libelant's Exhibit No. 1.)

(COPY.)

San Francisco, February 25th, 1916.

Ford Motor Company,
San Francisco, Cal.

Gentlemen:

Attention Mr. L. C. Davis.

We confirm freighting engagement as follows:

COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

RATE: $47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

SHIPMENT: Per American S. S. "Cacique," June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3000.00 per day.

Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

Yours very truly,

W. R. GRACE & CO.,

(Sgd.) H. E. MOORE,

Traffic Manager.

Accepted:

(Sgd.) FORD MOTOR CO. OF CANADA, LTD.,

By L. C. DAVIS.

[Endorsed]: United States District Court. No. 16,058. Grace Co. vs. Ford M. Co. of Canada. Lib. Exhibit No. 1. Filed Nov. 15, 1920. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [81]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Hon. MAURICE T. DOOLING, Judge.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR CO. OF CANADA, LTD., a Corporation,

Respondent.

(Testimony Taken in Open Court.)

Monday, November 15, 1920.

COUNSEL APPEARING:

For the Libelant: L. T. HENGSTLER, Esq.

For the Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. HENGSTLER.—If the Court please: In the case of Grace vs. Ford, Mr. Carter, the manager of W. R. Grace & Co. had to go East, to New York, a short time ago, by reason of the serious illness of his wife; he is on his way back to San Francisco for the purpose of attending this trial. We have a telegram from him, that he will arrive this afternoon, on the Overland, at 1:30. He is the one gentleman on our side who knows all the facts of this case, and will be our chief witness. On that ground, I would ask your Honor to continue the beginning of this case until two o'clock this afternoon.

The COURT.—Any objection to that? [82]

Mr. McCUTCHEN.—We have not any objection, your Honor, but I think it proper to state to the Court, before that course is acted upon, that we have a witness who is scheduled to leave for Honolulu on Wednesday. He is a very important witness to us, and one whom we would not want to call out of order. I have suggested to Mr. Hengstler whether it would not be possible for him to take up the two hours of the morning session—I think it

is not inappropriate to suggest to your Honor that the contract, for the breach of which this action is brought, was made on behalf of Grace & Co. by Mr. Moore, who was the Traffic Manager of Grace & Co. at the time the contract was made; Mr. Moore is in attendance here, and will undoubtedly be a witness. I would think it quite probable that the direct and cross-examination of Mr. Moore would consume at least two hours; there will be considerable correspondence to offer. While, as I say, I, or my associates, do not intend to object to the granting of the continuance, perhaps counsel could utilize this time.

The COURT.—If you have any witness here, Doctor, why can't we use the time at our disposal this morning?

Mr. HENGSTLER.—It is possible to do so, your Honor, to spend the time this morning, but I am under a disadvantage in the absence of Mr. Carter, because he is the one man who, from the beginning, had charge of this whole matter. Mr. Moore consulted with him. I have to begin the case being a little in the dark about several of the important facts I have to ascertain from Mr. Carter. I can go ahead, if these gentlemen insist upon it, now, but I am under that disadvantage. I think such a short continuance, in view of the facts, should be granted.

The COURT.—How long is it going to take to present your [83] side of the case?

Mr. HENGSTLER.—I think it will probably take me this afternoon and to-morrow morning.

The COURT.—Do you think you can do it by to-morrow noon?

Mr. HENGSTLER.—I think so, your Honor. I think, as far as I can say now, our case will be finished by to-morrow noon.

The COURT.—And your witness wants to leave on Wednesday morning, Mr. McCutchen?

Mr. McCUTCHEN.—Yes, your Honor, he is positively scheduled to leave on Wednesday morning. I would not want to put him on the stand before counsel has finished his case.

The COURT.—I think perhaps we had better proceed, Doctor, as far as we can this morning.

Mr. HENGSTLER.—Very well, your Honor.

If the Court please, this is a case of considerable importance, and in view of that fact it may be well to present to the Court an outline of the facts which the libelant proposes to prove in this case.

The case is based upon a contract dated February 25, 1916, made between W. R. Grace & Co., the libelant in this case, and the Ford Motor Co. of Canada, the respondent. It is a freighting agreement for space for 6200 tons of automobiles, to be transported to Wellington, New Zealand, and Sydney, Australia. The main provision of the contract refers to a shipment, and it is headed by the word "Shipment," and reads as follows:

> "Per American S. S. 'Cacicue' June Loading. When vessel is closer at hand will advise you more definitely as to exact loading date."

The letter is signed by L. C. Davis. Mr. Davis at the time [84] was the Traffic Manager of the

Ford Motor Co. at San Francisco. The 'Cacicue' that is mentioned in the contract was a tramp steamer, under control of W. R. Grace & Co., the libelant, and at that time en route from Baltimore to San Francisco, through the Straits of Magellan.

When Mr. Davis came to W. R. Grace & Co. for the purpose of finding an appropriate vessel to carry this large tonnage to Australia and New Zealand, W. R. Grace & Co. figured upon different vessels that could load such a cargo, and finally proposed to Mr. Davis the "Cacicue," explaining to him that the "Cacicue" was then engaged on that voyage, and would shortly arrive at a nitrate port, at Mejillones, would load nitrate there, with the destination of Vladivostok, and would, after that, proceed to one or two fuel ports, and then from there proceed to San Francisco, where she was to discharge a cargo, a cargo which was being carried, I think, from Baltimore; that thereafter she would load at San Francisco a cargo of machinery and cotton for Vladivostok; that then she would return from Vladivostok to San Francisco.

It was explained to Mr. Davis that her first arrival in San Francisco would be some time in March, probably toward the end of March; that her second arrival at San Francisco after the voyage to Vladivostok was expected to be in June.

Mr. Davis, for the Ford Motor Co., and Mr. Harvey E. Moore for W. R. Grace & Co.—he was the Traffic Manager of W. R. Grace & Co. at the time—and Mr. Carter, the Manager of W. R. Grace & Co., had a number of meetings preparatory to the

execution of this contract. During those meetings it was explained to them that the autos to be carried in the "Cacicue" were to leave the Ontario factory, the factory at [85] Walkerville, Ontario, during the month of May. As a matter of fact, the first shipment of automobiles left Walkerville on the 1st of May.

On May 13th Mr. Davis sent a letter to W. R. Grace & Co., which I will read to your Honor:

"W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, Calif.

"Gentlemen:

"Attention Mr. Moore.

"We are in receipt of letter from our Canada factory in which they enclose the following telegram:

"Refer wire twenty-eight relative autos shut out steamer 'West Mieth.' Norton now offer rate forty dollars Melbourne Sydney basis. Shall we accept? Answer quickly."

I may say in parenthesis here, your Honor, that the rate which the Ford Motor Co. agreed to pay to W. R. Grace & Co. for this "Cacicue" shipment was $47.50. In this agreement W. R. Grace & Co. are told:

"Norton now offer rate forty dollars, Melbourne Sydney basis; shall we accept? Answer quickly."

"You will observe from this how the situation is in the East, and that there is apparently some space to be had at somewhat lower quotation than our contract on the 'Cacicue.' It is very hard for our Canada factory to turn down an offer of this

character, and the misunderstanding regarding contract which we mailed to them covering 6200 tons which they advised they did not receive is probably the cause of their being unable to fulfill to the extent of 6200.

"We have written our factory requesting immediate information as to the amount of tonnage for Melbourne and Sydney and hope to receive some at an early date.

"Our wire from the factory dated the 8th reads as follows: [86]

"'Have shipped for 'Cacicue' 166 touring, 16 torpedoes, 34 chassis, for Sydney. Last car left factory May 5. Are shipping 252 touring, 42 torpedoes, 30 chassis for Wellington. Will finish shipping Wellington cars on May 11.'

"The approximate measurement of a carload of 12 tourings is 2101 feet. The approximate measurement of a carload of 12 roadsters is 1905 feet, and the chassis we figure about 557 feet, as they naturally are shipped less the body, which in a 12-car shipment measures 1544 feet.

"With these figures you will undoubtedly be able to approximately tell about what tonnage will go to Sydney and Wellington, as their wire above states that the rest of the Wellington shipment moves on May 11.

"FORD MOTOR CO.,
"Traffic Department.
L. C. DAVIS."

On May 16th Mr. Moore and Mr. Carter received

not furnish the 6200 tons, but would furnish only 4084 tons. That information was received through Mr. Davis. Mr. Moore and Mr. Carter protested, and insisted upon the fulfillment of the contract. The first direct communication received by W. R. Grace & Co. from the Canada office was received on May 18th, in a wire reading as follows: I think it will be clearer if I state first that on May 17th a message was sent by W. R. Grace & Co. to Ford Motor Co. of Canada, reading as follows:

"'Cacicue.' Must know immediately number cars each style and total measurement Wellington, also same information Sydney. Please wire fully to-day."

The contract, which was made on February 25, 1916, provided that quantity for each port was to be declared within [87] ten days from date. On May 17 it had not been declared, and that was the reason for sending that telegram.

The answer was received on May 18 from the Ford Sales Department, Ontario, in the form of a telergam reading as follows:

Mr. McCUTCHEN.—What was the date of that?

Mr. HENGSTLER.—It is dated Wednesday, the 17th; it was received by W. R. Grace & Co. on Thursday, the 18th. It reads as follows:

"Sydney 166 touring, 16 torpedoes, 34 chassis, total 763 tons.

"Wellington, 252 tourings, 42 torpedoes, 30 chassis, total 1190 tons.

"Other parts, 328 tourings, 52 torpedoes, 368 chassis, total 2017 tons. Also four carloads parts,

totaling 116 tons. This is complete 'Cacicue' cargo."

On receipt of this telegram, W. R. Grace & Co. sent a message to the Ford Motor Co., at Ford, Ontario, reading as follows:

"Yours 17th 'Cacicue': Please wire quickly what part 2017 tons Wellington and what Sydney. Your wire gives total 4086 tons. Must have full quantity 6200 tons covered your freighting contract February 25th or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo."

No answer was received to this telegram from the Ford Motor Co. for one week. Thereafter, on May 25, W. R. Grace & Co. mailed a letter to Canada, reading as follows:

"May 25th 1916.

"Ford Motor Co.,

"Ford, Ontario.

"Gentlemen:

"Although a week has elapsed, we are without reply to date to our telegram to you May 18th, as under: [88]

"'Yours 17th 'Cacicue': Please wire quickly what part 2017 tons Wellington and what Sydney. Your wire gives total 4086 tons. Must have full quantity 6200 tons covered your freighting contract February 25th or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo.'

"We understand from your San Francisco office

gram May 17th as being destined to 'other ports' is all for Sydney discharge. If you have not already done so, will you please confirm this by telegraph? It is understood, of course, that our Bills of Lading on this business apply to Sydney and to Wellington only, and do not cover on-carriage from those ports of discharge to final ports of destination.

"We confirm, as stated in our wire above, that we must have the full quantity of cargo which you have contracted to deliver us for S. S. 'Cacicue' for Wellington and Sydney, that is, 6200 tons of 40 cubic feet each, or in lieu of this amount of cargo the payment of dead freight on any portion of the contract not shipped. The time is too short to enable us to secure other cargo.

"Yours very truly,
"W. R. GRACE & CO."

The answer to this letter was received by W. R. Grace & Co. on June 5, in a letter written by the Ford Motor Co. of Canada, and dated June 1, 1916, and reading as follows:

"Gentlemen:

"We refer to your letter of May 25th.

"You have already had detailed reply to your wire of the 18th mentioned in your letter.

"Permit us to repeat the information we have already [89] given you with reference to the tonnage for the S. S. 'Cacicue' by ports as follows:

	Cubic Feet	Tons
Adelaide	8,323.91	208.10
Brisbane	16,342.79	408.57
Fremantle	10,014.40	250.38
Hobart	3,421.75	85.54
Melbourne	42,301.99	1057.55
Sydney	30,455.25	761.38
Wellington	47,503.12	1187.58
Parts (4 carload)	4,622.00	116.00
Total	162, 985.21	4075.00

"In addition, we have effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the coast originally contemplated to go forward by Union Steamships.

"We understand that you have let 524 tons additional, making 6099 tons all told out of the 6200 tons allotted to us.

"This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf has not been carried out by yourselves in that such an engagement calls for June loading, which in the parlance must necessarily mean June shipping, whereas we understand the steamer 'Cacicue' will not leave until about the 10th of July.

"We have been advised by Mr. Davis, Traffic Manager for Ford Motor Co., San Francisco, that the S. S. 'Cacicue' would leave on June 24th, and

Our plans were all laid with this in view, and your sailing date of July 10th has materially disturbed them. [90]

"We wish it therefore definitely understood that if by reason of the above and other circumstances our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding; in fact, we have so stated to Mr. Davis in all of our correspondence to him, and we presume he has given you ample notice to this effect.

"Yours very truly,

"FORD MOTOR CO., OF CANADA, LTD.,

"PRITCHARD, Sales Department."

We expect to show to your Honor that the last cars with automobiles for this shipment left Walkerville on May 29th, and that it would have been impossible for those cars to arrive in time for any June 14th or June 24th sailing, or even probably for any June sailing.

We expect to show that on June 9th the Ford Motor Co. of Canada, Ltd., sent a telegram to the Ford Motor Co. of San Francisco, a copy of which was handed to W. R. Grace & Co., and which reads as follows:

"Ford, Ontario, June 9, 1916.

"Ford Motor Co., City:

"Owing congestion large quantity cars arriving Australia at one time may be necessary to cut down 'Cacicue' cargo by Sydney, Brisbane and Melbourne cars and ship these later. Stop. If this is done can you arrange storage these cars Frisco or will free storage apply. Stop. Do not load any cars

'Cacicue' unless Grace agree that their default has voided any alleged contract, and that 4600 tons less what may be held as above will be loaded at $47.50 per ton and this cargo will not be held for freight for the balance. Stop. Without prejudice to this position, our connections here can likely supply 'Cacicue' with other cargo at $35.

"FORD MOTOR CO. OF CANADA, LTD."

[91]

This telegram was followed the day after, on June 10th, by another telegram from the Ford Motor Co., Ltd., of Canada, addressed to Ford Motor Co. of this city, a copy of which was handed to W. R. Grace & Co., and which reads as follows:

"Ford, Ontario, June 10, 1916.

"Ford Motor Co., City.

"Our wire ninth have decided to not hold up shipments to Sydney, Brisbane, Melbourne. Stop. Will load 4600 tons all told provided Grace agree this is in fulfillment of any contract and will not hold what loaded for entire freight.

"FORD MOTOR CO., LTD., OF CANADA."

The next communication received in connection with this matter was dated June 14, 1916, and received on June 23, 1916, and which reads as follows:

"Ford, Ontario, 14, 1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, Calif.

"Gentlemen: We refer to your letter of June 6th.

"Any arrangements that you have made for 6200

tons were effected through Ford Motor Co. of San Francisco, which arrangements we do not and never have considered binding upon this company, and which information we have previously given you and now repeat.

"We have forwarded 4075 odd tons of cargo for your S. S. 'Cacicue' at an ocean freight rate of $47.50. This is the entire cargo that we will forward for this vessel, and is the cargo that you have been informed from time to time would be forwarded for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this company for 6200 tons space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate, we will decline [92] to load any of the cargo whatever.

"It is not necessary for us to go into details for the reasons moving us. You have misunderstood our previous letter upon this subject. That letter was designed to simply show in an argumentative way that there had been a contract for 6200 tons binding upon this company, which has never been admitted, but has always been denied, such contract was inoperative by reason of the fact that your S. S. 'Cacicue' has already taken out a clearance for July 5th instead of loading and clearing in June.

"Our shipments of the 4075-ton quantity on the basis outlined above will be ready and alongside

your steamer on June 27th, as indicated by you.

"Yours very truly,

"FORD MOTOR CO. OF CANADA, LTD.,

"PRITCHARD,

"Sales Department."

We expect to show to your Honor that on June 22, 1916, Mr. L. C. Davis wrote a letter to the Southern Pacific Company, which carried these automobiles to San Francisco for this shipment, writing the letter on behalf of the Ford Motor Co. of Canada, reading as follows:

"San Francisco, June 22, 1916.

"Mr. W. J. Hardy,

"Care Southern Pacific Company,

"Fourth & Berry Streets, City.

"Dear Sir:

"Attention Mr. Frank Renz, Steamer Clerk.

"Confirming our telephone conversation of recent date:

"Until you are authorized to do so, please do not under any circumstances deliver any of the cargo at present on hand booked steamer 'Cacicue' to W. R. Grace & Co.

"FORD MOTOR CO.

"TRAFFIC DEPARTMENT,

"L. C. DAVIS." [93]

Under date of June 24, 1916, Mr. Davis wrote and sent the following letter to W. R. Grace & Co.:

"FORD MOTOR CO.,
"Automobile Manufacturers,
"San Francisco.

"W. R. Grace & Co.,
"332 Pine Street,
"San Francisco, Calif.

"Gentlemen:

"Attention H. E. Moore, Traffic Manager.

"We are in receipt of advice from our Ford Ontario factory in which they request that we inform you that 4075 odd tons is the full cargo for the steamer 'Cacicue,' and that they recognize no contract binding upon them to forward 6200 tons on this vessel. Also that unless the 4075 tons is taken on this understanding and not subject to freight for 6200 tons, they request that we withhold loading any of this cargo.

"FORD MOTOR CO.
"L. C. DAVIS,
"Traffic Department."

On June 27, 1916, the libel in this case was filed, and the automobiles attached by writ of foreign attachment. To minimize the damages in this case, W. R. Grace & Co. afterwards accepted 4075 tons of the automobiles offered to them at the rate of $35, and in addition to that 542 Peabody machines, which was an acceptance of 4075 tons instead of 6200 tons which were contracted for. This was made for the purpose of minimizing the damages. That means, as translated into terms of cars, that instead of sending 130 cars, or about 130 cars, the Ford Company forwarded only 85 cars; and in-

stead of delivering about 3270 packages only 2150 packages were delivered. All of that portion of the cargo which was delivered was accepted at the cheaper rate, that is, at the lower rate of $35, for the purpose of minimizing the damages. It was carried by the "Cacicue" to Sydney, and Wellington, [94] and there delivered.

Your Honor will note that the main dates are February 25, 1916, when the contract was made; that everything went along regularly and smoothly until May 13, the libelant thinking that the contract was in force, and it had no intimation that the other side took a different view of it; that on May 13 a lower freight was offered in the East for this class of cargo, and that then the telegram came from the Eastern office to Mr. Davis, advising him of that. That furnished the first motive for rejecting the contract.

The first objection to the contract was stated by the defendant on May 13th; there appears some intimation that Mr. Davis' contract, when it was forwarded by him from San Francisco to Ontario was lost in the mail. Nothing was said about any other objection then.

On June 1, in the letter which I read to your Honor, a second and different objection appeared, namely, the objection that this contract called for a June loading, and that W. R. Grace & Co. had broken the contract because they were not going in the future to make any June loading.

On May 14 an entirely new objection creeps out, a third objection; in one of the letters, as your

Honor noticed, it is stated that Mr. Davis is not authorized to make the contract, and that the contract is not binding on the company. The answer to the libel admits that a contract was made. So that this position is not taken by the respondent at the present time.

The libel in the case recites that W. R. Grace & Co. is a corporation; that is admitted. And that the Ford Motor Co. of Canada is a corporation, and that is admitted. [95]

In paragraph III, the fact of the contract is stated by libelant, but it is denied by respondent that it is correctly stated. We are willing, of course, to abide by the contract itself. The contract itself, the whole contract, reads as follows:

Mr. McCUTCHEN.—Doctor Hengstler, in that respect, I suppose the copy which is set up by us as an exhibit in the defendant's answer is a correct copy of the contract, is it not?

Mr. HENGSTLER.—I have not the answer before me.

Mr. McCUTCHEN.—Well, you can determine that later on. You do not in your libel suggest that there was any provision in the contract for June loading; I take it that that was an inadvertence in pleading the effect of the writing which had been signed by the parties.

Mr. HENGSTLER.—We merely intended to state the legal effect. That is a matter of law, anyway.

I will introduce in evidence the original contract. The whole contract reads as follows:

"San Francisco, February 25th, 1916.

"Ford Motor Company,

"San Francisco, Cal.

"Gentlemen:

"Attention Mr. L. C. Davis.

"We confirm freighting engagement as follows:

"COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

"RATE: $47.50 per cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

"SHIPMENT: Per American S. S. 'Cacaque' June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date. [96]

"DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3,000.00 per day.

"Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

"Yours very truly,

"W. R. GRACE & CO.,

"(Sgd.) H. E. MOORE,

"Traffic Manager.

"Accepted.

"(Sgd.) FORD MOTOR CO. OF CANADA, LTD.

"By L. C. DAVIS."

Mr. McCUTCHEN.—Are you offering that now?

Mr. HENGSTLER.—No, I am not offering it now, I just want to hand it to the Court.

Mr. WILLIAMSON.—It is set forth in the answer, a copy is set forth in the answer.

Mr. McCUTCHEN.—I do not object to this, Doctor. I understand, your Honor, that counsel is now making his opening statement.

Mr. HENGSTLER.—No, I got through with the opening statement; I am now on the pleadings.

Mr. McCUTCHEN.—Very well. We don't care for it, Doctor, we are familiar with it.

Mr. HENGSTLER.—It is a full copy, except that Mr. Davis' signature is not there. I merely hand the copy to the Court for convenience, so that your Honor can get an idea of what the contract is. I will offer the original in evidence later on if it is desired by the other side.

Paragraph IV of the libel reads as follows:

"That thereafter, and on or about the 5th day of June, 1916, libelant advised respondent, Ford Motor Co. of Canada, [97] Ltd., that as to the loading date aforesaid said steamship 'Cacicue' would be ready for loading said 6200 tons automobiles and parts in packages, as per said contract February 25, 1916, on the 27th day of June, 1916."

The answer to that allegation is:

"Claimant and respondent denies the allegations of article IV of said libel, and in that behalf alleges that prior to the 1st day of June, 1916, and at divers times, libelant gave claimant and respondent notice of earlier loading dates in the month of June, and

thereafter, and on or about the 6th day of June, 1916, gave to the Ford Motor Co. of San Francisco, California, that certain notice set forth in a copy thereof attached hereto, marked Exhibit "B," and hereby made a part of this answer, with the same force and effect as though pleaded at length herein."

Nothing was intended in the allegation of Article IV except to state the legal effect of Exhibit "B," and we are willing that Exhibit "B" should be substituted for the allegation of Article IV.

The fifth article of the libel is:

"That thereafter, and on or about the 23d and 24th days of June, 1916, about 1094 packages, consigned to the order of respondent, of automobiles and parts and packages, of wholly different description and bulk than required by and specified in said contract of February 25, 1916, were deposited by respondent, Ford Motor Co. of Canada, on Pier 26, in the city and county of San Francisco, on the wharf of libelant, alongside of which said steamship 'Cacicue' was to dock; and that thereafter, on the 27th day of June, 1916, said steamship 'Cacicue' arrived alongside of said dock and was in readiness to load said cargo [98] described and specified in said contract of February 25, 1916."

That is denied.

Mr. McCUTCHEN.—Doctor, for our enlightenment, does that mean that you were ready to load the 1100 packages that were then on the wharf, or that you were not ready to load those?

Mr. HENGSTLER.—We were not ready to load

the 1100 packages, because you did not deliver them to us.

The next allegation of the libel is that on the 23d and the 26th days of June, 1916, said respondent, Ford Motor Co. of Canada, Ltd., in writing, expressly refused to perform said contract of February 25, 1916, and advised and informed libelant that said respondent, Ford Motor Co. of Canada, Ltd., had forwarded 4075 odd tons of cargo for said steamship "Cacicue," at an ocean freight rate of $47.50; that said amount of 4075 odd tons was the entire cargo that said respondent, Ford Motor Co. of Canada, Ltd., would forward for said steamship, and that if libelant should attempt to hold said 4075 tons for freight for 6200 tons at said rate, said respondent, Ford Motor Co. of Canada, Ltd., would decline to load any of said cargo whatever.

That is denied. We have to prove that. For the purpose of proving the facts, I will now call Mr. Moore to the stand. [99]

Testimony of Harvey E. Moore, for Libelant.

HARVEY E. MOORE, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Mr. Moore, what is your business?

A. Present business?

Q. Yes. A. I am in the exporting business.

Q. What is your residence?

A. Chicago, Illinois.

Q. What was your business in February, 1916?

(Testimony of Harvey E. Moore.)

A. I was traffic manager for the San Francisco house of W. R. Grace & Co.

Q. You came from Chicago especially for the purpose of testifying in this case, did you not?

A. I did.

Q. Mr. Moore, what were your dealings with Mr. L. C. Davis, of the Ford Motor Co., during the month of February, 1916, with reference to a shipment of automobiles to Australia? How did those dealings originate?

Mr. McCUTCHEN.—It might be well, perhaps, to have in mind the fact that Mr. Davis was associated with the Ford Motor Co. at San Francisco, an American corporation. The respondent here is the Ford Motor Co. of Canada, Ltd., a Canadian or British corporation. I simply suggest that so that it may be borne in mind.

Mr. HENGSTLER.—You do not deny that Mr. Davis, of the Ford Motor Co. of San Francisco was acting for the Ford Motor Co. of Canada in this case, do you?

Mr. McCUTCHEN.—We do not deny that Mr. Davis acted as the agent of the Ford Motor Co. of Canada in the making of this contract; the making of the contract is admitted. I am not making any objection to your question. I simpy thought it was wise to interject that comment here.

A. Some time in February, about the middle of the month, I believe, Mr. Meyers, then Commercial Agent of the Southern [100] Pacific Railway, of San Francisco, brought a gentleman to my office in

(Testimony of Harvey E. Moore.)

the offices of W. R. Grace & Co., and introduced him to me as Mr. L. C. Davis, of the Ford Motor Co. He stated that Mr. Davis had a quantity of automobiles for freight to New Zealand and/or Sydney, and wanted to know what we could do toward lifting them from this port. It was brought out during the conversation that there were about 6200 measurement tons of these automobiles, which would weigh approximately 1,550 tons of 2240 pounds each dead weight. We had some conversation with reference to the rates then effective from San Francisco to the South Seas, and it is my recollection that Mr. Davis stated that he did not believe his company could afford to pay the going rate then of about $55 a ton on this shipment.

Mr. HENGSTLER.—Q. What was the rate which was then agreed upon between you and Mr. Davis?

Mr. McCUTCHEN.—One moment. Isn't that set forth in the contract?

Mr. HENGSTLER.—Yes.

A. There was some conversation covering that, and Mr. Davis finally agreed that they could afford to pay $47.50.

Mr. McCUTCHEN.—We have no objection to that.

Mr. HENGSTLER.—Q. Did Mr. Davis say anything about the time when these automobiles would be sent out here?

A. My recollection is that he said that the entire

(Testimony of Harvey E. Moore.)

shipment could move from the factory during the month of May, 1915.

Q. What were the conditions of the shipping business at the time with reference to finding a vessel for the purpose of carrying cargo of that nature?

A. Vessels were very scarce and rates were high at that time on account of the [101] scarcity.

Q. The rates were high at that time?

A. They were.

Q. What was that due to?

A. The scarcity of tonnage, vessel tonnage.

Q. What was the scarcity of tonnage due to?

A. The European war, no doubt.

Q. What did you say to Mr. Davis in response to his inquiry about a ship to carry this tonnage?

A. I told him that I did not know of any vessel we might have at that moment that could be assigned to that business, but that I would take the matter up with my superiors, and, if possible, we would detach a boat from our other service for this Australian-New Zealand cargo.

Q. Was anything in that conversation mentioned with reference to Mr. Davis' authority to act for the Ford Motor Co. in Canada?

A. I asked Mr. Davis particularly whether he was authorized to make such a contract in the event I could find tonnage for the business, and he said he was. He told me he had either a telegram or a letter, I don't remember which, but that he was fully authorized to proceed.

Q. Was anything mentioned at the meeting with

(Testimony of Harvey E. Moore.)

reference to the mode of packing these automobiles for export?

A. My recollection is that they had been experimenting with different packages for export, and they had succeeded—

Mr. McCUTCHEN.—One moment: The question is whether there was any conversation with reference to that matter, and I am inclined to think the question is leading, but I do not object to it on that ground.

The COURT.—He is giving his recollection of this.

Mr. McCUTCHEN.—I beg your Honor's pardon?

The COURT.—I understand he is giving his recollection of [102] that conversation.

A. And that they had succeeded in bringing it down to approximately to four to one.

Mr. HENGSTLER.—Q. What does that mean, will you kindly explain to the Court?

A. It means one ton of dead weight or 2240 pounds would measure approximately 160 cubic feet.

Q. That one ton of dead weight placed into the vessel would consume a space of how many cubic feet?

A. 160 feet, four measurement tons.

Q. 160 cubic feet? A. Yes.

The COURT.—That is because of the bulk of the articles compared with their weights? A. Yes.

Mr. HENGSTLER.—Q. Was any particular

(Testimony of Harvey E. Moore.)

steamer mentioned at the first interview which you had with Mr. Davis?

A. I think I pointed, I am sure I pointed out to Mr. Davis our map on the wall, there, which gave the position of practically our entire fleet. Whether I said at that particular moment that we could consider the "Cacicue" in connection with this shipment, I am not positive.

Q. What did you say to Mr. Davis with reference to your willingness to find a steamer to move this cargo?

A. I invited Mr. Davis and accompanied him into Mr. Carter's office, to discuss the matter with Mr. Carter, our submanager.

Q. What happened in Mr. Carter's office with reference to that—not details, but with reference to finding a vessel?

A. Mr. Carter was interested in the proposition, and after discussing it he or I, or both of us, told Mr. Davis that we would let him know later what could be done.

Q. What did your office, and by that I mean you or Mr. Carter, do with reference to this transaction, to this offer of the [103] Ford people?

A. We considered it—

Mr. McCUTCHEN.—I understand that is what did they do so far as the respondent is concerned?

Mr. HENGSTLER.—No, what W. R. Grace & Co. did with reference to this offer which was made to them by the Ford Motor Co.

Mr. McCUTCHEN.—I don't think we would be

(Testimony of Harvey E. Moore.)

bound by any conversation between Carter and this witness in the absence of Mr. Davis.

The COURT.—No; just so far as those were communicated to Mr. Davis. I understand you and Mr. Carter conferred about what ships you might have, and where they were, and what ones might be allotted to this business. A. Yes.

Q. As a result of that conversation, what did you communicate to Mr. Davis?

A. Several days later we communicated with Mr. Davis and told him that we had been able to locate a vessel.

Mr. HENGSTLER.—Q. What vessel did you finally tell him appropriate for the shipment?

A. The steamer "Cacicue."

Q. Did you tell Mr. Davis the particulars about the steamer "Cacicue"? A. As regards what?

The COURT.—As to when she would get here, what trip she had to make? A. Yes.

Q. With regard to her engagements? A. Yes.

Mr. HENGSTLER.—Q. What did you tell him?

A. I told him that the "Cacicue" was on a voyage from the Atlantic to San Francisco, partially loaded with coffee for discharge at San Francisco; that she was to stop at a nitrate port on the West Coast of South America, and take on 5000 tons of nitrate for Vladivostok; that she was to take on bunkers, oil fuel, somewhere between there and San Francisco, that is, between the nitrate port and San Francisco; that she would discharge [104] her coffee at San Francisco, fill up with cotton, and ma-

(Testimony of Harvey E. Moore.)

chinery, and other miscellaneous cargo from San Francisco to Vladivostok, that she would discharge at Vladivostok and return to San Francisco via one or more Oriental ports, and after she discharged at San Francisco any cargo which she might pick up on the return voyage, she would be made ready for this automobile cargo. At this time, we figured, from the speed she was making and other conditions, that she would be—

Mr. McCUTCHEN.—Do I understand that this was in the presence of Mr. Davis, that you figured on the speed?

A. I am relating what I told Mr. Davis, that she would be due in San Francisco for March loading for Vladivostok, for late March loading for Vladivostok, and that given a favorable voyage her probable date for returning for loading at San Francisco for these automobiles would be some time in June.

Mr. HENGSTLER.—Q. Did Mr. Davis at any time during these negotiations mention any particular time when the shipment should take place?

A. He mentioned the shipment would be made ready for shipment from the factory in May; but no stress was placed upon the fact—

Mr. McCUTCHEN.—I object to that as a characterization of the conversation. What is wanted is the conversation.

The COURT.—He can state it, if he can.

A. Mr. Davis did not impress upon me that June shipment from San Francisco was necessary. It is

(Testimony of Harvey E. Moore.)

my recollection that they had been trying very hard to find space for this particular lot of freight, and that they would very much appreciate anything which could be done by us to move it from San Francisco within a reasonable time after it arrived here.

Mr. HENGSTLER.—Q. Did you, or anybody on behalf of W. R. Grace & Co. in your presence, ever tell Mr. Davis that the [105] "Cacicue" was certain to arrive in San Francisco during the month of June, or at any particular time?

Mr. McCUTCHEN.—One moment; I think it would be better, if your Honor please, if the witness were asked for the conversation.

The COURT.—It would, but this is a long time ago, and I think the question is not an unfair one.

A. I did not. As a matter of fact, it would be impossible at that time, with the vessel's commitments ahead of her, to guarantee that she would arrive here in June.

The COURT.—I understood you to state, Mr. Moore, that what you said to him was, given a favorable voyage to Vladivostok and return she ought to be here to load sometime in June.

A. Yes.

Mr. McCUTCHEN.—I think the last statement of the witness ought to go out, that it would be impossible.

The COURT.—Unless he told Mr. Davis that.

Mr. McCUTCHEN.—Yes.

(Testimony of Harvey E. Moore.)

The COURT.—Q. Did you tell Mr. Davis that, that it would be impossible to figure definitely?

A. Yes.

The COURT.—Let it stand.

Mr. HENGSTLER.—Q. Had the "Cacicue" ever been used on any line of W. R. Grace & Co. on a schedule?

Mr. McCUTCHEN.—I object to that as irrelevant and immaterial.

The COURT.—The objection will be sustained.

Mr. HENGSTLER.—Q. Have you any recollection, Mr. Moore, as to the time when Mr. Davis was definitely advised that the "Cacicue" would be assigned for this particular business?

A. It would have been February 25 or a day or two previous to that. [106]

Q. And then you drew up this contract together, did you, on February 25?

A. That is the date of the contract, yes.

The COURT.—You prepared it?

A. I prepared it, and it was accepted by Mr. Davis.

Mr. HENGSTLER.—Have you the original of that?

Mr. McCUTCHEN.—I don't think we have the original, but we will consent that the copy may be substituted. There is no issue between us as to what the language of it was.

The COURT.—You mean this contract letter?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—A copy of that is set up as

(Testimony of Harvey E. Moore.)

an exhibit to the answer; there is no issue between us as to what the language of it was.

The COURT.—All right.

Mr. McCUTCHEN.—Might I suggest, possibly your purpose would be accomplished by simply an admission that the copy of the contract set up in the answer is a correct copy, and that would avoid the necessity of offering it.

Mr. HENGSTLER.—I would like to examine that copy.

Mr. McCUTCHEN.—If you have not done that, I will not ask it.

Mr. HENGSTLER.—I would like to see whether it is an exact copy in the answer before I make the admission. I think very likely it is.

Mr. McCUTCHEN.—It is set up as Exhibit "A" to the answer.

Mr. HENGSTLER.—I understand there is no objection that in lieu of the original this copy which is handed to me now by Mr. Williamson is a correct copy of the contract, and may be offered in evidence.

Mr. McCUTCHEN.—No objection. [107]

The COURT.—The copy of the answer is in accord with the copy you furnished me, except the initials "H. G. M." are signed instead of H. G. Moore, as set out in the answer, and that this is not signed at all—but the body of the contract is the same?

Mr. HENGSTLER.—There is no objection on the part of the other side that this copy be offered in evidence in lieu of the original.

The COURT.—All right.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—I would prefer it, because it corresponds exactly with the original, whereas the copy of the answer does not.

Mr. WILLIAMSON.—Will you furnish me a substitute copy for my record?

Mr. HENGSTLER.—Yes, I will give you this one.

(The contract was marked Libelant's Exhibit "A.")

Q. If you remember, Mr. Moore, what was the first meeting with Mr. Davis after the contract was made, and what was it about?

A. Well, I saw Mr. Davis at rather frequent intervals right along at that time, and I cannot tell you the first time I saw him after the contract was signed.

Q. Mr. Moore, I hand you a file marked "Ford Contract"; will you kindly identify it and tell the Court what this file is?

A. This is the file that I started on this contract.

The COURT.—Grace & Co.'s file? A. Yes.

Mr. HENGSTLER.—Q. That is Grace & Co.'s file with reference to this transaction, and was made up by yourself, was it not?

A. Very largely. The first part of it was, certainly.

Q. Referring to this file, can you refresh your memory and tell the Court whether there were any transactions with Mr. [108] L. C. Davis in connection with this matter after the contract was made?

(Testimony of Harvey E. Moore.)

A. There is a letter here signed by Mr. Davis, dated March 4, directed for my attention, handing a copy of the packages—handing me a memorandum of the form of the packages that were to be shipped in this cargo. This memorandum gives the length, width, height, gross and net weight of these packages. This was to establish the form by which the shipment was to be made.

Mr. McCUTCHEN.—I think the most orderly course would be to offer that letter in evidence, instead of having the witness' characterization of the letter, or his statement of the purpose of it.

Mr. HENGSTLER.—I do not care to have the letter in evidence. It is immaterial for this purpose. You can read the letter, and if you want it in evidence you can put it in. It is mere detail, this particular letter.

Q. When did you receive the first information—

Mr. McCUTCHEN.—Let me see that letter.

Mr. HENGSTLER.—It is only a detail with reference to the mode of packing.

Q. Mr. Moore, by referring to this file, can you tell the Court when you received the first information concerning a shortage in the shipment intended by the Ford Motor Co.?

Mr. McCUTCHEN.—Do I understand that that question calls for an inquiry, or calls for information as to whether he received that in the form of a letter or a telegram, or some written communication?

Mr. HENGSTLER.—No, at what time did he receive the first information in any form, either in

(Testimony of Harvey E. Moore.)

the form of a letter, or a telegram, or verbally from Mr. Davis, that less than 6200 tons would be shipped. [109]

A. Here is a letter from Mr. L. C. Davis, dated May 13, received in our office on May 15.

Mr. McCUTCHEN.—I do not want to be technical, but is that an answer to the question, that it was on the 15th of May you received first that information?

The COURT.—Is that the first information you received?

A. My recollection is that is the first information I received.

Mr. HENGSTLER.—Q. On May 13 you received the first information?

A. May 15. That letter was received May 15; it was written May 13.

Q. On May 15, in the letter dated May 13, you received the first information that less than the full amount was intended to be delivered: Is that correct? A. Yes.

Mr. HENGSTLER.—Do you want to see that letter?

Mr. McCUTCHEN.—Yes.

Mr. HENGSTLER.—Q. What did you do when the information was received, Mr. Moore?

A. We wired the Ford Motor Co. at Canada telling them that—

Mr. McCUTCHEN.—One moment; I submit that we ought to have the telegram.

Mr. HENGSTLER.—Yes.

(Testimony of Harvey E. Moore.)

Q. What wire did you send to the Ford Co. of Canada?

A. We wired them on May 17: "'Cacicue.' Must know immediately number cars each style and total measurement Wellington. Also same information Sydney. Please wire fully today."

Q. Did you receive an answer to this wire?

A. The answer was received in our office May 18.

Q. What was the answer received?

A. "Sydney 166 touring 16 torpedoes, 34 chassis, total 763 tons.

"Wellington 252 tourings, 42 torpedoes, 30 chassis, total [110] 1190 tons.

"Other ports, 328 tourings, 52 torpedoes, 368 chassis, total 2017 tons. Also four carloads parts totalling 116 tons. This is complete 'Cacicue' cargo."

Q. What did you do upon receipt of this telegram?

A. I tabulated it in pencil on the bottom of this telegram here showing the full total of the cargo then offered.

Mr. McCUTCHEN.—I suppose counsel is calling for some response to that.

Mr. HENGSTLER.—He gave me some response.

The COURT.—He said he tabulated the total. Then what did you do?

A. The full total of these amounted to 4086 tons. On May 18 we telegraphed the Ford Motor Co., Ford, Ontario: "Yours seventeenth 'Cacicue' Please wire quickly what part two thousand and

(Testimony of Harvey E. Moore.)

seventeen tons Wellington and what Sydney Your wire gives total four thousand eighty-six tons Must have full quantity sixty-two hundred tons covered your freighting contract February twenty-fifth or payment dead freight on quantity not shipped We regret time now too short us arrange other cargo."

Mr. HENGSTLER.—Q. What happened next?

A. We waited a week for reply, and not receiving any we wrote them on May 25. Do you wish me to read the letter?

Mr. HENGSTLER.—With your Honor's consent I would like to read the whole matter into the record, as W. R. Grace & Co. would like to keep their file intact.

The COURT.—All right.

A. May 25, 1916. Ford Motor Company, Ford, Ontario.

"Gentlemen: Although a week has elapsed we are without reply to date to our telegram to you May 18th, as [111] under:

"'Yours 17th Cacicue. Please wire quickly what part two thousand and seventeen tons Wellington and what Sydney. Your wire gives total four thousand eighty-six tons. Must have full quantity sixty-two hundred tons covered your freighting contract February twenty-fifth or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo.'

"We understand from your San Francisco office that the 2017 tons which you mention in your telegram May 17th as being destined to 'other ports'

(Testimony of Harvey E. Moore.)

is all for Sydney discharge. If you have not already done so, will you please confirm this by telegraph? It is understood, of course, that our bills of lading on this business apply to Sydney and to Wellington only and do not cover on-carriage from those ports of discharge to final ports of destination.

"We confirm, as stated in our wire above, that we must have the full quantity of cargo which you have contracted to deliver us for S. S. 'Cacicue' for Wellington and Sydney, that is, 6200 tons of 40 cubic feet each, or in lieu of this amount of cargo the payment of 'dead freight' on any portion of the contract not shipped. The time is too short to enable us to secure other cargo.

"Yours very truly,

"W. R. GRACE & CO.,

"Traffic Manager."

Q. Did you have any communication with Mr. Davis about that time?

A. We had a number of conversations over the matter, I could not give you the date, but, naturally, we were very much disturbed, and I talked to Mr. Davis about it several times.

Q. When did you receive a communication from the Ford Motor [112] Co. after May 25, the first communication after May 25?

A. They replied to that letter under date of June 1, received in our office on June 5.

Q. What does this letter state?

A. "Ford, Ontario, 6–1–1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, Calif.

"Gentlemen"—

Do you wish this printed matter read into the record, printed on their letterhead?

Mr. HENGSTLER.—Do you consent to his leaving it out?

Mr. McCUTCHEN.—We just want the letter.

A. "We refer to your letter of May 25th.

"You have already had detailed reply to your wire of the 18th mentioned in your letter.

"Permit us to repeat the information we have already given you with reference to the tonnage for the S. S. 'Cacicue' by ports as follows:

	Cubic feet.	Tons.
Adelaide	8,323.91	208.10
Brisbane	16,342.79	408.57
Fremantle	10,014.40	250.38
Hobart	3,421.75	85.54
Melbourne	42,301.99	1057.55
Sydney	30,455.25	761.38
Wellington	47,503.12	1187.58
Parts (4' carload)	4,622.00	116.00
Total	162,985.21	4075.00

"In addition, we have effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the coast originally contemplated to go forward by Union steamships.

(Testimony of Harvey E. Moore.)

"We understand that you have let 524 tons additional, making 6099 tons all told out of the 6200 tons allotted to us.

"This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf, has not been carried [113] out by yourselves, in that, such an engagement calls for June loading, which, in the parlance, must necessarily mean June shipping, whereas we understand the steamer 'Cacicue' will not leave until about the 10th of July.

"We have been advised by Mr. Davis, traffic manager for Ford Motor Co., San Francisco, that the S. S. 'Cacicue' would leave on June 24th and again advised that it would leave on June 14th. Our plans were all laid with this in view, and your sailing date of July 10th has materially disturbed them.

"We wish it, therefore, definitely understood that if by reason of the above and other circumstances, our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding; in fact, we have so stated to Mr. Davis in all of our correspondence to him, and we presume he has given you ample notice to this effect.

"Yours very truly,

"FORD MOTOR CO. OF CANADA, LTD.

"(Signed) PRITCHARD, Sales Department.

Mr. McCUTCHEN.—Q. Is there any stamp on that letter?

A. There.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—Q. What answer did you make to it?

A. The letter was answered by Mr. Carter; a copy of Mr. Carter's letter is dated June 6, 1916.

"Ford Motor Co. of Salada, Ltd.,

"Ford, Ontario.

"Gentlemen:

"Referring to your letter of June 1st.

"We are glad to note that you have now arranged to 6099 tons out of the 6200 tons allotted to you, and we hope that you will be able to supply the remaining tonnage."

Mr. McCUTCHEN.—Just a moment. I have no objection to this letter going in, but I understand that the witness [114] was asked for some information that he had. He is now reading a letter which he says was written by Mr. Carter. If he participated with Mr. Carter in the writing of that letter, I have no objection to it.

The COURT.—The question was, what reply was made. If you have no objection to the letter, let us take it in order.

Mr. HENGSTLER.—The other side have the original of that letter, and I asked for the production of it.

Mr. McCUTCHEN.—We do not object on that ground.

The COURT.—All right; let us proceed.

A. (Continuing.) "Referring to your letter of June 1st:

"We are glad to note that you have now ar-

(Testimony of Harvey E. Moore.)

ranged for 6,099 tons out of the 6,200 tons allotted to you, and we hope that you will be able to supply the remaining tonnage.

"We note with surprise your remarks on the subject of June loading, and, of course, do not agree with the contention which you reserve. We certainly cannot understand how, if you were not able to supply the agreed tonnage by a later date, your plans to supply it at an earlier date could have been disturbed and will accomplish our contract in accordance with its terms.

"We enclose copy of our letter of to-day's date to Mr. Davis, of your San Francisco office, from which you will note that shipment must be alongside our vessel on June 27th, ready for loading as fast as ship can receive in accordance with our contract of February 25th.

"Yours very truly,
"W. R. GRACE & CO.,
"Submanager."

Mr. HENGSTLER.—Q. What is the next communication which [115] you received?

A. A letter from the Ford Motor Co., Ford, Ontario, dated June 14, 1916, received in our office June 23d.

"Messrs. W. R. Grace & Co.,
"332 Pine Street, San Francisco, Calif.

"Gentlemen:

"We refer to your letter of June 6th.

"Any arrangements that you have made for 6200 tons were effected through Ford Motor Co. of San

(Testimony of Harvey E. Moore.)

Francisco, which arrangement we do not, and never have considered binding upon this company, and which information we have previously given you and now repeat.

"We have forwarded 4075 odd tons of cargo for your S.S. 'Cacicue' at an ocean freight of $47.50. This is the entire cargo that we will forward for this vessel, and is the cargo that you have been informed from time to time would be forwarded for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this company for 6200 tons of space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate, we will decline to load any of the cargo whatever.

"It is not necessary for us to go into details for the reasons moving us. You have misunderstood our previous letter upon this subject. That letter was designed to simply show in an argumentative way, that had there been a contract for 6200 tons binding upon this company, which has never been admitted, but has always been denied, such contract was inoperative by reason of the fact, that your S.S. 'Cacicue' has already taken out a clearance for July 5th instead of loading and clearing in June.

"Our shipments of the 4075-ton quantity, on the basis [116] outlined above, will be ready and

(Testimony of Harvey E. Moore.)

alongside your steamer on June 27th, as indicated by you.

"Yours very truly,

"FORD MOTOR CO. OF CANADA, LTD.,

"PRITCHARD,

"Sales Department."

The COURT.—We will meet at two o'clock.

(A recess was here taken until two o'clock P. M.) [117]

AFTERNOON SESSION.

HARVEY E. MOORE, direct examination (resumed).

Mr. HENGSTLER.—Q. The last letter you referred to this morning during your examination was the letter received from the Ford Motor Co. of Canada on June 23, and dated June 14; what communications did you and the Ford Motor Co., either the Ford Motor Co. of Canada, or Mr. Davis' office here in San Francisco, have after June 14, 1916?

A. On June 26th we received a letter from the Ford Motor Co. of San Francisco, dated June 24, 1916, reading as follows:

"W. R. Grace & Co.,

"332 Pine Street, San Francisco.

"Gentlemen:

"Attention H. E. Moore, Traffic Manager.

"We are in receipt of advices from our Ford, Ontario, factory, in which they request that we inform you that four thousand seventy-five (4075) odd tons is the full cargo for the steamer 'Cacicue'

(Testimony of Harvey E. Moore.)

and that they recognize no contract binding upon them to forward six thousand two hundred (6200) tons on this vessel. Also that unless the four thousand seventy-five (4075) tons is taken on this understanding and not subject to freight for six thousand two hundred (6200) tons, they request that we withhold loading any of this cargo.

"FORD MOTOR CO.

"L. C. DAVIS,

"Traffic Department."

Q. What was the next communication after that?

A. We then sent a telegram to the Ford Motor Co. of Canada, Ltd., at Ford, Ontario, dated Monday, June 26, 1916, reading as follows:

"Referring to your contract with us, of date February 25, 1916, wherein you agree to ship 6200 tons 40 cubic feet each [118] of automobiles and parts, in packages, at $47.50 per 40 cubic feet measurement, freight prepaid, since you have informed us, in your letters of the 14th and 24th inst. that you will not deliver to us the 6200 tons which you agreed to deliver, we now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us, and hold you responsible for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking

(Testimony of Harvey E. Moore.)

a smaller quantity of automobiles than the quantity will which you contracted to deliver, we do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as the partial satisfaction which it, in fact, is; and by the acceptance of any such smaller quantity, we do not in any way release or waive any claim for damages or demurrage due to your breach of your contract.

"Yours very truly,

"W. R. GRACE & CO.,

"H. E. MOORE,

"Traffic Manager."

On that same day I dictated a letter to the Ford Motor Co. of Canada, Ltd., at Ford, Ontario, reading as follows:

"We have your letter of June 14th, received here June 23d, also letter of June 24th from Ford Motor Co., San Francisco, and confirm our wire to you of to-day's date as follows"—and then follows the telegram which I have just read. Shall I read it again?

The COURT.—No, I do not think it is necessary.

A. (Continuing.) On June 26th I dictated a letter to the Ford [119] Motor Company, 21st and Harrison Streets, City, attention Mr. L. C. Davis, reading as follows:

"Replying to your letter of June 24, we have to-day wired your Ford, Ontario Office, as follows"—and then follows a copy of the same telegram.

Mr. HENGSTLER.—That is all. I have no further questions to ask on direct examination.

(Testimony of Harvey E. Moore.)

Cross-examination.

Mr. McCUTCHEN.—Q. Will you read the introductory portion of that letter of the 26th to the Ford Motor Co. of San Francisco?

A. "Replying to your letter of June 24th, we have to-day wired your Ford, Ontario, office as follows."

Q. When was that letter of June 24th received by you? A. June 26th.

Q. Did you make any other communication to the respondent at or about that time?

A. Written communication?

Q. You sent a telegram and you wrote a letter on the 26th to the Ford Motor Co. of Canada.

A. Yes.

Q. And you wrote a letter to the Ford Motor Co. of San Francisco on the same day? A. Yes.

Q. Both of those letters acknowledged the receipt of the two communications of the 14th of June and the 24th of June, didn't they? A. Yes.

Q. Did you make any other communication to the Ford Motor Co. of Canada on the 26th or immediately following the 26th of June? Didn't you make a communication to them on the 28th of June?

A. Here is a copy of a telegram dated June 28th, sent to the Ford Motor Co. of Canada, Ltd.; is that what you have reference to?

Q. What I wanted was a letter. I will reframe the question. Did [120] you address a letter to the Ford Motor Co., San Francisco, on the 28th of June? I will show you this letter, Mr. Moore; it will refresh your recollection.

(Testimony of Harvey E. Moore.)

A. I don't see any copy of that letter in here.

Q. That is your signature, is it not?

A. Yes, that is my signature; yes, here is the copy of it.

Q. Will you read that letter?

A. "Ford Motor Co., 21st and Harrison Streets, City.

"Gentlemen:

"Attention Mr. L. C. Davis.

"Please take notice that in accordance with our previous advices the steamship 'Cacicue' was ready to load your cargo contracted for on February 25, 1916, on June 27, 1916, at 9:00 P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of $3000 per day commences on the day and at the hour last mentioned. We this morning wired above to your Ford, Ontario, office."

Q. And you did so wire, did you?

A. There is a copy of the telegram in this file, yes.

Q. Did you address a letter to the Ford Motor Co. on the 22d of June?

The COURT.—Let us get the telegram to the Ford Co. at Ontario, first.

A. A telegram dated June 28, 1916.

"Please take notice that in accordance with our previous advices the steamship 'Cacicue' was ready to load your cargo contracted for on February 25, 1916, on June 27, 1916, at 9:00 P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of three

(Testimony of Harvey E. Moore.)

thousand dollars per day commences on the day and at the hour last mentioned."

Mr. McCUTCHEN.—Q. Did you address a communication to the [121] respondent, or to the Ford Co. of San Francisco, on the 22d of June?

A. Yes.

Q. That letter is addressed to the Ford Motor Co. of San Francisco, is it not? A. It is.

Q. And you repeated a copy of it, did you not, to the Ford Motor Co. of Canada, the respondent here? A. Yes, sir.

Q. Is that the letter (showing)? A. It is.

Q. Will you read it, please?

A. "Ford Motor Co., 21st and Harrison Streets, San Francisco, Calif. Gentlemen:" It is dated June 22.

"Supplementary to our letter June 6th advising that S. S. 'Cacicue' would be ready for loading at San Francisco June 27:

"Please note the delivery of 6200 tons automobiles and parts full quantity of your engagement under contract dated February 25 must commence on that date, June 27, and be completed not later than June 29.

"Yours very truly,

"W. R. GRACE & CO."

Q. When did the "Cacicue" reach port here?

A. At which time?

Q. In the month of June, 1916.

A. I have not got the exact date with me.

(Testimony of Harvey E. Moore.)

Q. She reached here on the morning of the 27th of June, didn't she?

A. I have not the date with me.

Q. How long, Mr. Moore, had you been the traffic manager of Grace & Co.?

A. The actual Traffic Manager of the San Francisco house for Grace & Co., I had been at that time, I should say, a little over—well, I am sorry I cannot tell you.

Q. Approximately.

A. I cannot tell you approximately. I was first engaged by Grace & Co. as Traffic Manager of their Atlantic and Pacific service through the Canal. [122]

Q. Where were you located then?

A. First in New York, and afterwards in San Francisco.

Q. How long did that employment continue, that is to say, as Traffic Manager of that department of their business? A. Three years, probably.

Q. And where were you located during that time? You say in New York, and where else?

A. San Francisco.

Q. In New York and San Francisco? A. Yes.

Q. Did you leave that employment to come to the house here as Traffic Manager?

A. When the Canal was blocked down there they suspended the Atlantic and Pacific service, and I continued with this house here as Traffic Manager of the other services.

Q. Would you say that you were traffic manager

(Testimony of Harvey E. Moore.)

here for as much as a couple of years, that is to say, aside from the three years' employment that you have mentioned?

A. No, I was in San Francisco, I think, less than four years altogether.

Q. And during all of that time were you traffic manager? A. Of one service or the other.

Q. Prior to the time that you went into the service of Grace as Traffic Manager for this eastern business or Canal business, had you had any experience as a Traffic Manager for other houses?

A. Not for other houses; I had been in the railway business for many years.

Q. You had been engaged in the transportation business for a great many years, had you?

A. Yes.

Q. And you were quite familiar with it, were you not, in all of its branches and phases?

A. That is a pretty broad statement.

Q. Well, were you generally familiar with the transportation business, both rail and steamer transportation?

A. I so considered [123] myself; yes.

Q. How long had you been in that business before entering the service of Grace & Co.?

A. Some 20 years.

Q. While you were with Grace & Co., was it, or not, your duty to make contracts for the shipment of freight on the vessels which were being operated by Grace & Co.?

A. I was booking cargo for them. Very few of

(Testimony of Harvey E. Moore.)

our freighting contracts were covered by written contracts, they were mostly by exchange of letters.

Q. You understand that a contract may be set forth in letters as well as in a formal instrument that is called a contract, do you not?

A. Probably.

Q. Would it be a correct statement to say that you had been in the habit of drafting letters in which were set forth contracts for shipment during the three or four years that you were at the head of the Traffic Department of Grace & Co.?

A. It would.

Q. So that you were quite familiar with the drafting of such contracts? A. Yes.

Q. You say you do not know when the 'Cacicue' arrived in port here, but you do know the fact that she did arrive in port, do you not?

A. I do know that she arrived, yes.

Q. Were you at the dock when she docked?

A. I was not.

Q. Did your duties require you to go upon the dock when a steamer docked? A. No, sir.

Q. You had nothing to do with that?

A. No, sir.

Q. Who, in Grace & Co., came in contact with the captains when they arrived in port?

A. It would usually be a representative of the Steamer Department.

Q. And who were the representatives of the Steamer Department [124] of Grace & Co. at that time?

(Testimony of Harvey E. Moore.)

A. I am not sure whether it was Mr. Eggers or Mr. Cushing.

Q. In your letter of the 22d of June, you called upon the Ford Motor Company to have its freight upon the dock upon the morning of the 27th, so that the loading could be completed by the evening of the 29th; why did you do that?

A. The letter does not so read.

Q. Possibly I have not stated that accurately, Mr. Moore, but I thought I had. The letter says that loading must commence on that date, June 27th, and be completed not later than June 29th, does it not?

A. My copy does not read so; my copy reads that the delivery must commence at that time.

Q. I think you are right about that. Why was it important that the delivery of freight should be completed by the 29th of June?

A. That letter was undoubtedly written on the strength of some request given me by our steamer or operating department.

Q. Have you any independent recollection of that? A. I have not.

Q. You state in this letter that delivery must commence on the 27th of June; see if you cannot refresh your recollection and tell us whether at that time you knew when the "Cacicue" would berth?

A. I cannot recall it now.

Q. You are quite certain that she was not in port on the 22d, when you wrote the letter, are you not?

A. I could not tell; I do not think she was, but I am not certain.

(Testimony of Harvey E. Moore.)

Q. Was she in port when you wrote the letter of the 26th?

A. Not knowing just when she came in, it is hard for me to say; I do not know.

Q. You will notice that this letter of the 22d expressly says that the "Cacicue" will be ready to load at San Francisco June [125] 27, do you not? A. Yes, I notice that.

Q. Did you not know at that time, Mr. Moore, that the "Cacicue" would not be ready to load on the 27th of June?

A. That was figured out from her position and her schedule—her performance.

Q. That is to say, from her schedule and her performance, you knew that she probably could not arrive here before the morning of the 27th?

A. That was figured as the probable date of her arrival, I think, at that time.

Q. Did you know the condition prevailing in San Francisco at that time with reference to the ability to discharge and load freight on steamers?

A. I don't recall; that is an operating detail that I don't remember.

Q. And you have no recollection now that there was a strike of stevedores prevailing in San Francisco at that time, and that the discharge and loading of the ships of Grace & Co. was very, very much delayed?

A. If that is the fact, I have forgotten it.

Q. You have forgotten, you say?

A. I say if that is the fact, I have forgotten it.

(Testimony of Harvey E. Moore.)

Q. And you have no recollection on that subject now whatsoever? A. I have not.

Mr. HENGSTLER.—I suggest, if your Honor please, that all of this is not cross-examination. Are you making Mr. Moore your own witness?

Mr. McCUTCHEN.—No, I am not making him our own witness. This is practically all set forth in the correspondence which you have offered, or in correspondence of which that was a part.

Mr. HENGSTLER.—Strike of stevedores?

Mr. McCUTCHEN.—No, not strikes of stevdores, but the statement in the letter that they would be ready to load on the [126] 27th. I think, if your Honor please, that when we get along a little further we will show that it is quite germane to the information which was elicited on the direct examination.

Mr. HENGSTLER.—I have not any real objection, even if you should make him your witness, if you desire to do so.

Mr. McCUTCHEN.—No, I am not making him our witness.

Q. Now, going back to the interviews which you had with Mr. Davis, when Mr. Davis first approached you, what did he say he wanted?

A. He wanted to move these automobiles to New Zealand and Australia.

Q. When?

A. Within a reasonable time after they arrived here.

(Testimony of Harvey E. Moore.)

Q. Within a reasonable time, but he did not mention any month? A. No, sir.

Q. You say that he had some letters and telegrams which he showed you in response to your inquiry as to whether or not he had authority to make the contract? A. I don't believe I so testified.

Q. Well, did he show you some letters and telegrams? A. He did not.

Q. And you did not testify—

The COURT.—He testified that Davis told him he had letters and telegrams which authorized him to make the contract.

Mr. McCUTCHEN.—Q. And you did not ask him to exhibit those letters or telegrams to you?

A. He had not them with him.

Q. He did not have them with him? A. No.

Q. Did you tell him at that time that the "Cacicue" would be ready for early June loading?

A. I never made a positive statement of that character, I—

Q. Well, did you tell him that, whether positive, or not? [127]

A. (Continuing.) Nobody would be in a position to make a positive statement about the date of arrival here or elsewhere of a tramp steamer of that character.

Q. And you were not in a position to make any statement when the ship would arrive?

A. It was always indicated by "probable" or "expected arrival."

Q. Did he tell you that he had communicated with

(Testimony of Harvey E. Moore.)

the office in Ontario and had told them that the ship would be ready for early June loading?

A. Not to my recollection.

Q. Did he come back to you afterwards, and before the contract was signed, or shortly after it was signed, and ask you for a date when the ship would sail? A. Not to my recollection.

Q. He might have done that?

A. Well, he may have asked many questions.

Q. And did you not tell him then that she would sail about the 14th of June?

A. Not to my recollection.

Q. When did you figure that the ship would return here, when you talked with Davis?

A. I can only say in a general way, some time in June.

Q. Didn't you tell him about the 13th of June?

A. Not to my recollection.

Q. Did you not follow the ship on the chart and say that she would be ready for loading about the 13th of June?

A. I remember following the ship's course on the map and indicating a probable date of her return to San Francisco on that second voyage.

Q. What was the probable date that you did indicate? A. I don't remember.

Q. Was it the 13th or 14th of June?

A. Not to my recollection; I don't think we could figure down that close. [128]

Q. It may have been?

A. I don't think it was figured down that close.

(Testimony of Harvey E. Moore.)

Q. In those conversations between you and Mr. Davis, was anything said at all about June loading?

A. Probable June loading.

Q. You say you had been in the habit of preparing contracts for shipment of freight for several years; after this conversation between you and Davis, you sat down, yourself, did you not, and without any suggestion from him, and prepared that contract?

A. I don't think he was there when it was written.

Q. Are you sure he was not there when it was written?

A. No, I am not sure that he was not there.

Q. Aren't you sure that the words "June loading" were your language and not Davis' language?

A. I cannot give you a positive answer to that.

Q. You have no present recollection that Mr. Davis participated in the preparation of that contract, have you?

Mr. HENGSTLER.—Do you mean in writing the words?

Mr. McCUTCHEN.—Yes. I am talking about the preparation of it, now, not the execution of it.

A. No, I don't think he was.

Q. You don't think he participated in the preparation of it? A. I don't think so.

Q. You have prepared many times, during your time, have you not, contracts for the shipment of freight which read, "June or July loading," have you not, where the understanding was that the loading might be made in June or in July?

(Testimony of Harvey E. Moore.)

A. I have written some such contracts, yes.

Q. Has it not been your invariable practice, where the understanding between you and the shipper was that the shipment might be made in one month or in the month following, to so expressly [129] state in the contract?

A. When it covered a spread of 60 days I would do that.

Q. Did this contract cover a spread of 60 days?

A. The freight was to be lifted when the "Cacicue" returned to port.

Q. Did the understanding between you and Davis cover a spread of 60 days?

A. I don't know that those words were used.

Q. Did the understanding between you and Davis cover a spread of 60 days; did you have any understanding to that effect?

Mr. HENGSTLER.—Wait a moment, Mr. McCutchen; you don't permit him to finish his answers.

Mr. McCUTCHEN.—Pardon me, finish your answer.

A. (Continuing.) The understanding was that the cargo was to be lifted when the "Cacicue" returned from Vladivostok, and we designated that voyage as her June loading in San Francisco, to distinguish it from her March-April loading, when she left for Vladivostok.

Q. Then it might take place in June, or in any month following June? A. It might.

Q. If, then, the "Cacicue" was not ready to load until August, that contract would have meant

(Testimony of Harvey E. Moore.)

August loading, and not June loading, would it? Do you understand the question? A. I do.

Q. Will you answer it, please?

A. I think it would; yes.

Q. And if she had not been ready to load in August, it would have meant September loading?

A. We probably would have found other tonnage if she was going to be that late.

Q. I am not talking about that; but that would have been your understanding, that if the ship had not been ready to load in August—

Mr. HENGSTLER.—I object to this, if your Honor please, that is a question of law rather than a question of fact.

The COURT.—The objection is overruled. He says the words [130] in there do not mean June loading; we want to find out what it does mean, according to his idea.

Mr. McCUTCHEN.—Q. (Continuing.) It might have meant September loading, might it?

Mr. HENGSTLER.—It might be proper to suggest here, if your Honor please, that the words in the contract are "'Cacicue' June loading."

The COURT.—I understand that, but he says it meant whenever the "Cacicue" returned to this port from her voyage to Vladivostok; now, pursuing that inquiry, counsel desires to learn whether this contract would extend over into August, September, October, November, December, or whatever time the ship got back from Vladivostok, and he wants to know if those words would cover all that period, and

(Testimony of Harvey E. Moore.)

I think that is a proper question to ask him, as he drew the contract.

Mr. McCUTCHEN.—Now, Mr. Reporter, will you read the question to the witness.

(Question read by the reporter.)

A. Well, that contingency did not arise, and I cannot answer your question.

Mr. McCUTCHEN.—For your Honor's information, the language of this contract is, in reply to the suggestion by counsel, and it appears opposite the word "shipment" in the margin: "Per American S. S. 'Cacicue' June loading."

Q. That is to say, the contingency which might have made it possible to load in September: Is that what you mean? A. Yes.

Q. Did the contingency which might make it possible to load in some month following June arise?

A. Well, she arrived late in June, I believe, and she—

Q. Answer the question. Isn't the question clear to you? [131] Is the question clear?

A. Yes, it is clear.

Mr. McCUTCHEN.—Now, Mr. Reporter, read the question to the witness.

(Question read by the reporter.)

A. If the steamer was ready to take on cargo on June 27th, I don't know whether she could have taken that on by the end of the month, or not; that is a question for the Operating Department to answer.

(Testimony of Harvey E. Moore.)

Q. Was that a subject of discussion in the office of Grace & Co. at that time?

A. I don't recollect that.

Q. You were having a great deal of discussion, as you have testified, with reference to this transaction, were you not?

A. My principal connection with it was in the early part of the arrangement.

Q. You have produced a letter here and read it in which the Ford Co. states that your engagement was for a loading in June, and that it had been informed that you would not be able to load until July, haven't you?

A. One of my letters, do you mean?

Q. I think so. Well, it was a letter to which you replied; you may not have written the letter. The June 1st letter.

A. I think the June 1st letter was from the Ford Co.

Q. Yes, it was to your office, and it came to your knowledge, did it not?

A. I did not reply to that letter.

Q. Did it come to you?

A. I was not in San Francisco at that time; it did not come to me at that time; I saw it afterwards, after it had been replied to.

Q. Was not that a subject of considerable discussion in the office of Grace & Co., as to when that ship should be loaded, and when it would be possible to load her?

(Testimony of Harvey E. Moore.)

A. I was not there [132] at that time, I don't know.

Q. How long were you there after that letter was written, after the letter of June 6th was written?

A. Probably ten days or two weeks after that.

Q. You were there on the 22d?

A. Yes, I had got back then.

Q. Wasn't it a subject of discussion in the office of Grace & Co. on or about or subsequent to the 22d of June, that is to say, when the ship was obligated to load, and when she would be called to load?

A. I cannot recall any specific conversations at that time about this.

Q. I am not asking you for specific conversations; did you not know at that time that the "Cacicue" could not load in June?

A. I cannot say that I did know it.

Q. And you have no recollection now of ever having heard that subject discussed, about the 22d of June, or the days following the 22d of June?

A. I don't recall it.

Q. Had you heard it discussed up to the time when you sent the telegram of the 26th of June, calling upon the Ford Company to deliver freight for loading on the "Cacicue"?

A. I probably had.

Q. Are you quite sure that you had?

A. I cannot testify positively that I had.

Q. Is it your present impression that you had?

A. It is my impression that I had.

Q. Then the letter, or the telegram, of the 26th

(Testimony of Harvey E. Moore.)

of June, was sent with a knowledge on your part that a very sharp question would arise with reference to the time when you should load the "Caicue"; isn't that true?

A. Well, I think the Ford Co. had made that pretty plain.

Q. On the 28th, when you sent the letter which you have read, did you know then that the "Caicue" could not load during [133] the month of June?

A. I am not an operating man; I cannot tell you what she could do.

Q. You said in that letter: "As you have failed to deliver the cargo alongside the steamer as fast as the vessel can load, demurrage at the rate of $3000 a day will begin,' etc.; had there been any failure to deliver freight as rapidly as the vessel could load?

A. I believe at that time the freight was tied up here in the yards.

Q. Answer my question, had there been any failure to deliver freight at that time as rapidly as the vessel could load?

A. My letter was undoubtedly founded on facts; I cannot recall just now what fact led up to it.

Q. Was the vessel in condition to load a pound of freight on the 28th of June?

A. You will have to ask our Steamer Department about that.

Q. Why, then, did you state that freight had not

(Testimony of Harvey E. Moore.)

been delivered alongside the vessel as rapidly as it could be loaded?

A. That letter must have been founded on information received from our docks, or from our Steamer Department.

Q. Were you so out of touch with the affairs of Grace & Co. with reference to a matter of that importance at that time that you did not know whether that vessel was in condition to receive freight, or not?

A. It was not my duty to examine the vessels.

Q. Then someone connected with Grace & Co. had given you the assurance, had they—

A. (Interrupting.) Undoubtedly.

Q. (Continuing.) That freight had not been delivered as rapidly as the vessel could load it?

A. Undoubtedly.

Q. Then you understood, when you penned this communication of the 28th of June, that from and after the 27th of June the vessel [134] was in condition to receive and load the Ford Co. freight?

A. I must have been so informed; yes.

Q. And you don't know from whom you got that information? A. I do not now; no, sir.

Q. You cannot suggest to us anybody connected with Grace & Co. who might have given you that information?

A. It might have been from our dock superintendent, or it might have come from the head of the Steamer Department; I cannot tell you.

Q. Did any of those people possibly tell you that

(Testimony of Harvey E. Moore.)

they were having great trouble in discharging the incoming cargo from the "Cacicue"?

A. I don't recall that.

Q. And you never heard that the vessel was having difficulty in discharging that incoming cargo?

A. I don't recall what she brought in, I don't recall what the cargo was.

Q. When you wrote that letter of the 28th, did you not know that the vessel would have to go into drydock before she could proceed on her return voyage? A. I did not know it.

Q. Had you ever discussed that with anybody?

A. That did not come within my province; I don't remember it.

Q. As you were the traffic manager, do you know that the ship did afterwards go into drydock?

A. It is my impression that she did, but I do not know.

Q. Did you write that letter of the 28th of June, and did you send the telegram of the 26th of June, on the direction of somebody else, or were they both, or was either of them, sent on your own initiative?

A. I think they must have been sent after consultation.

Q. With whom?

A. Mr. Carter was my chief; I would very likely talk it over with him.

Q. You remember, then, that you did send those two communications [135] pursuant to instructions from Mr. Carter?

(Testimony of Harvey E. Moore.)

A. It might not have been pursuant to instructions, but after consultation.

Q. Would you have assumed the responsibility of sending those communications on your own initiative? A. It is very doubtful.

Q. When you say that you may have talked with Mr. Carter, is it your best impression that Mr. Carter did tell you to send those two communications?

A. It is quite likely that I wrote out the telegrams and they were corrected before they went out.

Q. Have you any means of verifying that?

A. No, I have not.

Q. Why, if this matter was out of your department, did you write that letter of the 28th of June? Why wasn't it written by the man in whose department that part of the business fell?

A. They had no correspondence, as a rule, with the shipping public; that was all handled through the traffic department.

Q. Were you in the habit of writing any letter that a member of one of these other departments should tell you to write, with reference to business that had been initiated by you?

A. I would on request.

Q. Did you hear that the ship would have to undergo repairs at the time before you learned that she had actually gone into drydock?

A. I have no recollection of it.

Q. You were traffic manager: Will you give us a little more information, Mr. Moore, as to what your

(Testimony of Harvey E. Moore.)

duties were as traffic manager, and what was the scope of your authority?

A. My principal duty was to secure cargo for our steamers.

Q. Did you have anything to do with the transaction after the contract of affreightment was made?

A. In what way do you mean?

Q. In any way. Did your connection with the matter end a soon as a contract for the shipment of freight was made?

A. No; it would be up to me to get the cargo here to go aboard [136] the steamer.

Q. That is, to see that the cargo was delivered on the dock?

A. To keep after the railway people and see that the cargo arrived in San Francisco.

Q. And was put on the dock alongside the ship?

A. No, that would apply principally to our dock superintendent; he would call on the railway for the cargo as he wanted it.

Q. Was he under your instruction? A. No.

Q. Do you know, or did you learn, when the first shipment or delivery of automobiles was made by the Ford Company on the dock?

A. I cannot tell you.

Q. Did you ever hear that any delivery was made?

A. If any deliveries were made, I probably heard of it.

Q. If any deliveries would have been made you would have heard of it? A. Probably.

(Testimony of Harvey E. Moore.)

Q. Didn't you hear that a delivery of 1100 tons had been made down there?

A. I probably knew of it at the time, but I don't recall the circumstance now.

Q. Then if there was a delivery by the Ford Co. of 1100 tons of automobiles on the dock on the 23d and 24th days of June, you knew of it at the time, did you?

A. Well, it is probable; I won't say that I did know it.

Q. Who told you to state specifically to the Ford Company that it would be held liable for demurrage at $3000 per day? A. I cannot tell you that.

Q. Where did you get the $3000, where did that come from?

A. It is in the contract, I believe.

Q. And you intended to tell the Ford Motor Co. in that letter that that contract was still in force as to the demurrage feature of $3000 a day, did you?

A. Yes. [137]

Q. In one of these letters from the Ford Company it is said that they had been informed that you had effected a clearance of that ship to sail in July; was that the fact? A. Not to my recollection.

Q. Would you know that, if it had been the fact?

A. I would not.

Q. That was not within your department?

A. No, sir.

Q. Did you know anything about the cargo that was brought in on the "Cacicue" at that time?

A. I don't remember what it was.

(Testimony of Harvey E. Moore.)

Q. That was also not in your department; that is to say, your department was not concerned with that feature of the business?

A. It might have been, but I don't recollect what that was.

Q. You don't remember that she had on board about 7900 tons? A. No, I do not.

Q. Do you remember how long, as a matter of fact, was required to discharge that cargo?

A. I do not.

Q. Do you know when the "Cacicue" was ready to go to sea, after arriving on the 27th of June?

A. I cannot recall the date. You see, it is over four years ago, and I cannot remember that.

Q. Was it late in the month of July, at any rate after the middle of July?

Mr. HENGSTLER.—There is no question about when she went to sea, as far as those dates are concerned, Mr. McCutchen.

A. I can get the date for you, but I don't know it now.

Mr. McCUTCHEN.—Is it conceded, Doctor, that she was not ready to go to sea until the 27th of July?

Mr. HENGSTLER.—It is conceded that she went to sea on the 27th of July.

Mr. McCUTCHEN.—Is it conceded that she was not ready, that she could not have gone to sea earlier than that?

Mr. HENGSTLER.—No, it is not; on the contrary, we claim [138] she could have gone to sea earlier if it had not been for delays that were partly

(Testimony of Harvey E. Moore.)

due to the nondelivery of this shipment. As a matter of fact, she did not go to sea until July 27th. We will concede that, and we will concede all the dates with reference to where she went, and when she was in port, and so on.

Mr. McCUTCHEN.—I understand you to say now she could have gone to sea earlier if the Ford Co. had delivered this cargo?

Mr. HENGSTLER.—Yes, and also that she could have loaded earlier.

Mr. McCUTCHEN—How much earlier?

Mr. HENGSTLER.—Well, that I am not prepared to say.

Mr. McCUTCHEN.—Will you fix a date when she could first have begun to take on cargo?

Mr. HENGSTLER.—I am not a witness now.

Mr. McCUTCHEN.—No, but you are here representing the libelant.

Mr. WILLIAMSON.—And it will save time.

Mr. McCUTCHEN.—Q. Do you know whether the utmost effort was being made between the time the "Cacicue" arrived here and the time when she actually left to go on her outward-bound voyage?

A. We always did that; we always turned our boats around as soon as we could.

Q. So that if the "Cacicue" did not leave here until the 27th of July, that, as you understand it, was the first date when it would have been possible for her to leave?

A. Well, I won't make that affirmative statement,

(Testimony of Harvey E. Moore.)

Q. Then I will put it to you negatively: Do you know whether it would have been possible, with the utmost expedition, the "Cacicue" having arrived here on the 27th of June, to have gotten [139] her in condition to proceed on her outward voyage earlier than the 27th of July?

A. I do not know what her condition was when she arrived; I have no idea what held her up here that length of time.

Q. You say that on the 26th of June you sent a telegram to the Ford Company, which you confirmed in a letter; the letter which you wrote stated, did it not, that that telegram was sent in response to the Ford Company's letter of June 14th, and its letter of June 24th; that is correct, is it not?

A. I think it is.

Mr. McCUTCHEN.—Has your Honor that letter of the 26th in mind, or the telegram of the 26th? If your Honor has not that in mind, I would like to call your attention to it.

The COURT.—I remember it in a general way.

Mr. McCUTCHEN.—I was going to ask the witness some questions about it, and I would like to have you have that clearly in mind before I do so.

Q. Now, Mr. Moore, you did two things with reference to this: You sent a telegram to the Ford Motor Company in Canada; that is correct, is it not? A. Yes.

Q. That was on the 26th? A. Yes.

Q. You confirmed that telegram in a letter to the Ford Motor Co. of Canada, in which letter you

(Testimony of Harvey E. Moore.)

stated that the telegram was sent in response to the two letters of June 14th and June 24th; that is correct, is it not?

A. Here is the letter.

Q. That reads: "We have your letter of June 14th, received June 23d, also letter of June 24th from the Ford Motor Co. of San Francisco." So that that telegram was sent in response to those two letters; that is correct, is it not?

A. That is what it says. [140]

Q. At the same time, or about the same time, you addressed a letter to the Ford Motor Co. of San Francisco, in which you repeated a copy of that telegram, did you not? A. Yes.

Q. Stating that you had transmitted that to the Ford Co. in Canada? A. That is a matter of record.

Q. What did the libelant do after that time with reference to this transaction, and up to the time that this libel was filed?

A. The matter passed out of my hands.

Q. So far as you know, it didn't do anything, did it?

A. Well, shortly after that we made efforts to secure cargo to—

Q. Do you know when this libel was filed, Mr. Moore? A. No, I do not.

Mr. McCUTCHEN.—Does your Honor remember when the libel was filed?

The COURT.—I think the date has been stated here.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—The libel was filed on the 27th of June.

The COURT.—Yes. We met this once before several years ago didn't we, in some collateral proceeding, or on a motion of some kind?

Mr. McCUTCHEN.—Yes, your Honor.

Q. Did you make any efforts to secure cargo before this libel was filed, which was filed on the afternoon of the 27th of June?

A. I don't remember when we began working on that feature of it.

Q. So far, then, as you know, you had no communication of any kind,—and when I say "you," I mean the libelant, you had no communication of any kind with the respondent after you sent those letters and the telegram of the 26th of June, up to the time that the libel was filed?

A. I do not recall any that have not been introduced in evidence so far.

Q. And when I say "communication," I mean written or verbal, or [141] a communication of any kind or character. I understand you to say that so far as you know, no such communication was made? A. I don't recall any.

Q. Did you ever see the captain who brought that ship into port?

A. I don't even remember who the captain was.

Mr. McCUTCHEN—What was the name of the captain, Doctor Hengstler—can you tell us?

Mr. HENGSTLER.—His name was Mueller.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—Q. Does that name enlighten you at all, Mr. Moore?

A. I remember Captain Mueller very well. He probably came up to the office after the steamer came in.

Q. You have no present recollection whether you talked with him, or not, after he returned from that voyage? A. No.

Q. You say you probably knew that freight was delivered on the dock by the Ford Co.; does the figure 1100 tons mean anything to you, does it refresh your recollection?

A. No, it does not.

Q. It does not? A. No.

Q. You do not recall now ever having heard that quantity of freight discussed, that is to say, 1100 tons? A. I don't recall it.

Q. Or 1100 packages?

A. No, I don't recall it.

Q. When this libel was filed, was there any discussion with you by anybody representing Grace & Co., or acting for Grace & Co., as to an effort to foreclose a maritime, or an alleged maritime lien upon that 1100 tons or 1100 packages of freight?

A. I don't think so; it would not concern me.

Q. What is that?

A. It would not concern me; I don't think I was consulted about it.

Q. You would not have been called into that feature of the matter? A. No. [142]

Q. You would not have been a member of a con-

(Testimony of Harvey E. Moore.)

ference taking that subject up? A. No.

Q. You read this morning a letter dated June 6th, which you said was sent by Mr. Carter, your sub-manager; do I understand you to say that this package of papers which you have on your lap now was your file? A. Yes.

Q. Then that letter composed by Mr. Carter was in your file, was it?

A. A copy of it; he always made several copies of all the letters written in the office for various files.

Q. Did he consult with you before he wrote that letter?

A. I was not in San Francisco at the time.

Q. Is there another letter in your file dated the 6th of June?

A. Here is a copy of a letter apparently dictated by Mr. Mann.

Q. I have called your attention to a letter dated the 22d of June, which you say was written by you to the Ford Company; what was the occasion of the writing of that letter, Mr. Moore?

A. It seems to be a notice to them that the cargo is to be delivered to us.

Q. You had written them the same thing, had you not, in your letter of June 6th?

A. I don't know why it was necessary to reiterate the information to them.

Q. As far as you know, you had not received anything from them following your letter of June 6th, and up to the 22d of June, had you, that would have

(Testimony of Harvey E. Moore.)

made it a prudent or a proper thing to write this letter of the 22d?

A. We had received this letter in the meantime from Mr. Davis.

Q. You got that on the 24th; you had not that in hand on the 22d, when you wrote this letter?

A. I beg your pardon, it was received here on the 26th.

Q. Yes, exactly, but this letter is dated the 22d. [143]

A. Oh, yes, I see.

Q. You suggest that this is supplemental to your letter of June 6th.

A. I cannot recall the circumstances that led up to the writing of that letter.

Q. Is it not the fact that that letter was probably written in answer to their letter of the 14th of June, or because you had received their letter of the 14th of June?

Mr. HENGSTLER.—Just see when that letter of the 14th of June was received by your office, Mr. Moore.

A. It was received June 23d.

Mr. HENGSTLER.—That would be after this letter was written.

Mr. McCUTCHEN.—Yes, the mark so indicates, but I was wondering whether that was not a mistake. That letter was sent on the 14th, and according to this stamp was not received until the 23d, which was a very long interval.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—There may have been a Sunday intervening.

Mr. McCUTCHEN.—Even so, that is nine days.

Q. Do you know why it is that you waited until the 26th to reply to that letter of the 14th of June, which you received on the 23d?

A. It is quite possible a Sunday might have intervened there, a Saturday afternoon and Sunday; I don't know, though.

Q. It seems to me I recall you said you sent that telegram on Monday, the 26th; that may be the explanation for it. I don't know what day of the week that date fell on. It seems to me now that I do recall that you said that was on Monday.

A. Here it is (showing).

Q. Yes, that might afford an explanation for that. At any rate now, to fix those dates, there is no doubt that the letter of June 14th was in hand in your office on the 23d of June?

A. It bears the office stamp of that date. [144]

Q. That would mean that it had been received on the previous Friday?

Mr. HENGSTLER.—How do you mean, Mr. McCutchen?

Mr. McCUTCHEN.—If Monday was the 26th, the 23d would have been the previous Friday, wouldn't it?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—Sunday the 25th, Saturday the 24th, and Friday, the 23d.

Mr. HENGSTLER.—Yes.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—Q. You were not concerned with informing yourself as to what cargo the "Cacicue" was bringing in on that voyage, if I understand you correctly? A. I was not; no.

Q. Do you know anything about the length of time required to discharge cargo?

A. It depends on the nature of the cargo, and what the facilities are, and what kind of a vessel it is.

Q. Do you know what length of time would have been required to discharge a miscellaneous cargo of 7900 tons from the "Cacicue" immediately following the 27th of June, 1916?

A. I witnessed the discharge of 7500 tons of cargo from one ship in one day, 24 hours, in Salina Cruz.

Q. What I want to know is whether you have any information as to the length of time which would be required to discharge a cargo of 7900 tons from the "Cacicue," beginning the 27th of June and continuing until it was discharged?

A. That would be a question for our Operating Department to answer.

Q. You have not any opinion on that subject at all? A. No.

Q. And I suppose you also have a lack of knowledge as to the time that would be required to load a cargo on to the "Cacicue"?

A. I could not give you any exact figures on it.

Mr. McCUTCHEN.—That is all. Will this witness remain in [145] attendance, Doctor?

Mr. HENGSTLER.—Yes, I think so.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—I don't know that we will want to recall him, but we might.

Mr. HENGSTLER.—Q. You expect to be here a few days, Mr. Moore, do you not?

A. I will remain as long as you want me.

Mr. McCUTCHEN.—I would like to have the witness remain within call; we might want to call him again.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Moore, Mr. McCutchen examined you on your experience with reference to writing this kind of a booking contract. Suppose, in writing a booking contract, you had intended to put the time when the shipment must be made so that that time should be guaranteed, how would you express such an intention?

Mr. McCUTCHEN.—I object to that, if your Honor please, as calling for the speculation of the witness.

The COURT.—The objection is overruled.

A. Cargo to be delivered alongside the vessel on or before such a date.

Mr. HENGSTLER.—Q. You know what is meant by a cancelling date in that kind of a contract?

A. Yes.

Q. What is the ordinary wording when a cancelling date is intended in a contract with reference to the time when a shipment must be delivered?

A. If the cargo is not delivered on or by such a date, the contract would be cancelled. There is no set form for it.

(Testimony of Harvey E. Moore.)

Q. That is what you would have done if it had been intended to put a cancelling date into this contract? A. Yes.

Q. Now, Mr. Moore, will you refer to your file there and to a [146] letter written by an officer of the Southern Pacific Company to another officer of the Southern Pacific Company in San Francisco, referring to the arrival of some of the cars constituting this shipment, that letter being dated May 10? A. Here is a copy of such a letter.

Q. Will you please read this letter to the Court?

A. (Reading:) The letter is written on the stationery of the Southern Pacific Company, Pacific System, dated San Francisco, Cal., May 10, 1916.

"Mr. W. J. Hardy,

"San Francisco, Cal.

"Supplementing our letters of May 5th, 8th, and 10th, desire to state that the Ford Motor Co. of Canada, Ltd., forward from Walkerville, Ont., May 4th—

LV 8247
B&M 64062
Via G. T., I. C., U. P., S.P.
B&O 192750
WAB 71,867
Via Wab., U. P., S. P."—

Mr. McCUTCHEN.—I do not understand that this letter was written to this witness or by him.

Mr. HENGSTLER.—No, it was not, but what I desire to show is—

Mr. McCUTCHEN.—I do not think that this is

(Testimony of Harvey E. Moore.)

the proper way to make that offer. I think it ought to be offered either while the man who wrote it or the man who received it is on the stand. There might be some explanation of it.

Mr. HENGSTLER.—What I desire to show is this, if your Honor please, that this letter was written in the course of this transaction, and, as the letter itself shows in the body of it, notice of that letter was sent to both parties— [147]

Mr. McCUTCHEN.—If that is the fact, I do not make any objection to it. I have not seen the letter.

Mr. HENGSTLER.—To Grace & Co., to your people, and I think Mr. Williamson has probably got there in the file a copy of this letter.

A. (Continuing.) "CB&Q 116756

Via G. T., C. B. & Q., U. P. and S. P.

CRI&P 36560

Via G. T., R. I., D. & R. G., S. P.

"All for the S. S. 'Cacicue' June or early July.

"J. B. STUBBS.

c. c. W. R. Grace & Co. Attention Mr. Moore.

Ford Motor Co. Attention Mr. Davis,

Mr. A. F. Frye."

That is a carbon copy to him.

Q. Did Mr. Davis, or anybody on behalf of the Ford Motor Co., at any time take any exception to the statement in that letter with reference to the "Cacicue" late June or early July?

Mr. McCUTCHEN.—I object to that. That seems to be a letter written by the railroad company, and I do not think it would have been neces-

(Testimony of Harvey E. Moore.)

sary for the respondent to have taken any exception to it, in so far as Grace & Co. were concerned.

The COURT.—That seems to me to be true. This was apparently a letter from the railroad itself to itself, was it not? A. A carbon copy.

The COURT.—But the letter, itself, was not a letter that called for a reply from anybody. It would be a communication from one department of the railroad to another, or from one railroad man to another, concerning this shipment—was it not?

A. Yes.

Q. A copy of which was sent to Grace & Co. and to the local Ford [148] Co., but they are not bound by any declaration made there. They are not bound to reply to it. They could not make a contract for them.

Mr. HENGSTLER.—I am not offering the letter for that purpose, but I am offering it for the purpose of showing that all of the parties who were concerned in this shipment and who were active in this shipment understood at the time this letter was written that it was to be a shipment late June early July, and that that understanding was brought to the notice of the other side, and the other side acquiesced in it.

The COURT.—You cannot show it by that letter, because whoever wrote that letter either knew that to be a fact or did not; if you can get him here you can get from him that information, but you cannot prove it by the letter.

Mr. HENGSTLER.—I will get the evidence

through the party who wrote the letter. Of course, I appreciate that it would have no direct weight, except that it corroborates the other evidence that all parties understood about this shipment that time was not of the essence of the contract.

The COURT.—That may have been what the railroad company understood, but that is not going to establish this contract.

Mr. HENGSTLER.—I desire to save an exception to your Honor's ruling, if it is ruled out at the present time.

The COURT.—Yes. That would not preclude you from bringing the writer of this letter here to show that he received from respondent the information that that was their understanding of the contract.

Mr. HENGSTLER.—I will try and bring the writer here, if I can locate him.

Now, if your Honor please, I am informed that Mr. Carter has arrived [149] in the city, but that he is not well and not able to appear in court this afternoon, that he got sick on the train, and I would ask for a continuance until to-morrow morning.

The COURT.—Is Mr. Carter the only other witness you have?

Mr. HENGSTLER.—There is one possible witness whom I may have to call, but I am not certain until I see Mr. Carter whether it is necessary to call him.

The COURT.—If we finish up by noon will that give you time to put your witness on who has to depart?

Mr. McCUTCHEN.—Yes, but if it does not, I am going to ask Dr. Hengstler and the Court to call that witness out of order, as he must leave on Wednesday.

Mr. HENGSTLER.—I have no objection to calling him at nine o'clock tomorrow.

Mr. McCUTCHEN.—I prefer not. I would rather have as much of the libelant's case in as possible.

The COURT.—We will take this matter up again at ten o'clock.

Mr. HENGSTLER.—Just a moment. I called for the production of a number of papers of correspondence between the Ford Motor Company of Ontario and the Ford Motor Co. of San Francisco bearing upon this question, and I would like an opportunity to inspect those records. It would save the time of the Court if I could inspect them between now and to-morrow, instead of going through them at the time of the trial to-morrow.

Mr. WILLIAMSON.—This request was made, if your Honor please, on Saturday.

Mr. HENGSTLER.—I made a motion to produce them some weeks ago, two weeks ago.

Mr. WILLIAMSON.—Two weeks ago, but you abandoned that, I believe, did you not? [150]

Mr. HENGSTLER.—Three weeks ago.

Mr. WILLIAMSON.—At any rate, it makes little difference, except this, that the Ford Co's records in San Francisco, other than those which were available to me in 1916, under the policy prevailing in

San Francisco, the American Ford Co. for some years apparently have destroyed records within the last two years without our knowing it, so I cannot produce what they have destroyed, but I have a little here that was given to me in 1916.

The COURT.—Will you let them see what you have?

Mr. WILLIAMSON.—Yes. The Canadian Ford files, of course, are entirely beyond my reach now. It takes some time to get them. I have some here without knowledge that you wished for them, because we wished to have them here. The communications from myself to the Ford Co. are in the different files.

Mr. HENGSTLER.—I do not ask you for those.

Mr. WILLIAMSON.—If you will tell me anything you want, I shall be glad to show it to you.

The COURT.—If you will tell him what you have, he will tell you what he wants, I assume.

Mr. WILLIAMSON.—I could not produce all our correspondence for a year or more.

The COURT.—I do not suppose you would be asked to, but those bearing on this controversy you ought to be able to.

Mr. GRIFFITHS.—I asked you, Dr. Hengstler, for the blue-prints of the vessel. Will you get those and the log-book? If we can have those in the meantime it will help us.

Mr. HENGSTLER.—I received a notice to produce some papers late on Saturday; nevertheless, I will give you all we have; we have some blue-prints,

but not all of them, but everything I [151] will let you have, that we have.

(An adjournment was here taken until to-morrow, Tuesday, November 16th, 1920, at ten o'clock A. M.)

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [152]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Hon. MAURICE T. DOOLING, Judge.

VOLUME 2.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR CO. OF CANADA, LTD., a Corporation,

Respondent.

Tuesday, November 16, 1920.

COUNSEL APPEARING:

For the Libelant: L. T. HENGSTLER, Esq.

For the Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. HENGSTLER.—Mr. McCutchen, did you say you wished Mr. Moore for further questions?

Mr. McCUTCHEN.—No, I simply wanted him

(Testimony of Harvey E. Moore.)

in attendance. I do not want to question him any further now.

Mr. HENGSTLER.—I will recall him.

Testimony of Harvey E. Moore, for Libelant (Recalled).

HARVEY E. MOORE, recalled for libelant.

Mr. HENGSTLER.—Q. Mr. Moore, you desire to correct an answer which you gave yesterday to one of my questions on redirect examination, do you not? A. I do.

Q. I will call the question and answer to your mind; it is on [153] page 64 of the transcript.

> "Q. What is the ordinary wording when a cancelling date is intended in a contract with reference to the time when a shipment must be delivered?
>
> "A. If the cargo is not delivered on or by such a date the contract would be cancelled; there is no set form for it."

That is the way the answer reads. In what respect do you wish to correct this answer?

A. What I intended to say was this, if the ship is not ready to load on or by a certain date, shippers would have the option of cancelling.

Q. You have not gone over your testimony in full, have you? A. No.

Mr. HENGSTLER.—That is all for the present. It may be that when Mr. Moore reads over his entire testimony he might have some minor corrections to make.

(Testimony of G. H. Carter.)

Mr. McCUTCHEN.—You may have some further testimony from Mr. Moore, is that what you mean?

Mr. HENGSTLER.—No, only possibly he might want to correct some portion of his testimony; we have not been able to go over it all yet.

Mr. McCUTCHEN.—In view of that suggestion, I think we shall pass any further examination we have; I don't know that we will have any. If Mr. Moore has any further corrections to make in his testimony, I would be glad to have them made now.

Mr. HENGSTLER.—I don't know that he has any. We have not yet been able to read the transcript in full.

Testimony of G. H. Carter, for Libelant.

G. H. CARTER, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Mr. Carter, what is your business?

A. Shipping, with W. R. Grace & Co. [154]

Q. What is your position with W. R. Grace & Co.? A. I am manager.

Q. What was your position during the year 1916? A. I was assistant or sub-manager.

Q. Did you in that connection come into contact with Mr. L. C. Davis, of San Francisco, in connection with a contract made with the Ford Motor Co. of Canada? A. Yes.

Q. When did you first meet Mr. Davis in that connection, as near as you can remember?

A. In February; Mr. Moore brought Mr. Davis

(Testimony of G. H. Carter.)

in to see me regarding the possible arrangement to give them a steamer for Australia.

Q. As nearly as you can remember, what was the conversation between you and Mr. Davis?

A. Mr. Davis wanted a steamer in position to take cargo which would be shipped from his Canada factory in May.

Q. What was the cargo to consist of?

A. Automobiles.

Q. Was the quantity mentioned at the time when Mr. Davis called upon you?

A. Yes, some 6,000-odd tons; I think it was 6,200 tons.

Q. What did he desire you for W. R. Grace & Co. to do in connection with that cargo?

A. He wanted to know if it was not possible for us to divert one of our steamers from the regular trade, in order to be able to take care of this business for them, to carry this cargo from San Francisco to Australia.

Q. And what did you tell him?

A. At first I told him it would not be possible, as it seemed at that time there was no chance of our arranging a steamer, but at a later meeting with Mr. Davis, after going over our records and our business, I found that we might be able to put in the steamer "Cacicue."

Q. Why did you select the steamer "Cacicue" for that purpose?

Mr. McCUTCHEN.—We object to that as immaterial and [155] irrelevant.

(Testimony of G. H. Carter.)

The COURT.—The objection is overruled.

A. All our other steamers were on regular runs, which made it impossible to withdraw them, and the "Cacicue" was the only possible boat which we could divert to any business from our regular business.

Mr. HENGSTLER.—Q. What were Mr. Davis' requirements for the steamer, as he stated them to you, in his conversations with you?

A. He wanted a steamer capable of carrying the entire amount of 6,200 tons, and was particularly anxious that the steamer should not be too early.

Q. Did he give any reason why he did not wish the steamer too early?

A. They were crowded in getting out automobiles at their factory; the discussion at that time was the possibility of their cargo not being ready in case a vessel made early June.

Q. What did you tell them with reference to the movements of the "Cacicue" at the time when your conversations took place?

A. I outlined the voyages the "Cacicue" was to make; she was then on the way to the West Coast of South America, to complete her cargo for the Northern Pacific ports here. She was bound for, I think it was, 5,000 tons of nitrate. On bringing that nitrate here and discharging the nitrate, and the coffee which she then had on board, she was booked for a voyage to Vladivostok, and on her return from that voyage she was due in San Francisco some time in June, and it was at the termination of that voy-

(Testimony of G. H. Carter.)

age that we made this freighting agreement to take this cargo of automobiles.

Q. What do you mean by saying she was due in San Francisco sometime in June?

A. Figuring her schedule and the time that she normally would make, and estimating the time for loading [156] and discharging, she would be what we would call scheduled arrival in June.

Q. What information was given to Mr. Davis with reference to the time of her arrivals?

Mr. McCUTCHEN.—Q. That is, you mean by the witness?

Mr. HENGSTLER.—Q. (Continuing.) Yes, by you, or by Mr. Moore in your presence.

A. Do you mean at this meeting in February, or later?

Q. At any meetings in February, prior to making the contract?

A. As I remember, Mr. Davis was there when we roughly figured the position of the vessel, and what her position would be at the end of the Vladivostok voyage. I do not remember the exact date in June that that calculation brought the ship, but it was known to be an estimated date, only.

Q. What did you understand by the wording: "'Cacicue' June loading," in the contract that was thereafter made with Mr. Davis?

Mr. McCUTCHEN.—Well, it does not appear that the witness drew the contract, or signed the contract.

Mr. HENGSTLER.—Q. Did you have anything

(Testimony of G. H. Carter.)

to do with the making of the contract, Mr. Carter?

A. No, nothing to do with the making of the contract. The contract was made by Mr. Moore on authority from me to close the business, and—

Mr. McCUTCHEN.—One moment; I object to any conversation between Mr. Carter and Mr. Moore. This libel declares upon this contract as the contract of Grace & Co.; I think we are not bound by any conversation between Mr. Moore and Mr. Carter prior to the making of the contract, or, indeed, after the making of the contract.

The COURT.—Well, that seems to close the incident. All the witness stated was that the contract was made by Mr. Moore upon [157] his authorization. There you are.

Mr. HENGSTLER.—Q. Mr. Carter, you have had vast experience in the making of freight engagements, have you not?

A. I suppose you might call it vast; I have had considerable experience.

Q. How long have you had experience in that line? A. Fifteen years.

Q. Could you give the Court any idea of how many freighting contracts, approximately, during those fifteen years, you made with different parties?

Mr. McCUTCHEN.—I would like to inquire whether this testimony is offered for the purpose of explaining what counsel claims to be an ambiguity in this contract.

Mr. HENGSTLER.—Yes, it is, your Honor.

Mr. McCUTCHEN.—And of what does that ambiguity consist?

Mr. HENGSTLER.—I desire to follow it up by asking him what he, with his experience and after he saw this contract, understood by the words "'Cacicue' June loading."

Mr. McCUTCHEN.—Is it claimed by you, then, that those words are ambiguous?

Mr. HENGSTLER.—Those words are certainly ambiguous in the sense that they need explanation by the witness.

Mr. McCUTCHEN.—There is no suggestion in the pleading of any ambiguity in the contract. The contract is declared upon as it was drawn.

Mr. HENGSTLER.—Those words are certainly ambiguous, because they might mean "'Cacicue' guaranteed June loading," or "'Cacicue' expected June loading." On the very face of it, those three words, it seems to me, require explanation.

Mr. McCUTCHEN.—There is no suggestion or effort to reform this contract in any way. It seems to me it is not permissible, [158] particularly for this witness, who did not participate in the drawing of the contract, to state what he understands the contract to mean. That is for the Court to determine.

Mr. HENGSTLER.—This particular witness, while he did not make the contract, is the manager of the libelant that made the contract.

The COURT.—We will take the testimony.

Mr. HENGSTLER.—And further, your Honor,

(Testimony of G. H. Carter.)

he was as much interested in it as if he had made it himself, in its meaning and in its wording.

The COURT.—Proceed.

Mr. HENGSTLER.—Will you read the last question, Mr. Reporter?

(Question read by the reporter.)

A. I have no idea, but, of course, we have made a large number of freighting contracts.

Q. There would be hundreds of them, anyway, would there not, Mr. Carter? A. Possibly.

Q. What did you understand by the words of this contract after it was made, and in the light of what happened between you and Mr. Davis, "Shipment per American S. S. 'Cacicue' June loading"?

Mr. McCUTCHEN.—That question is duplex. If the answer is to be based to any extent on what happened between him and Mr. Davis, I submit that ought to be developed, so that we can present our objection properly.

The COURT.—Yes, that is true. I suppose you mean, based on what he has already testified to as having occurred between himself and Mr. Davis?

Mr. HENGSTLER.—Yes, your Honor.

Mr. McCUTCHEN.—In the light, then, of that amendment or [159] suggestion, I submit that it is entirely immaterial and irrelevant what this witness understood the contract to mean after the contract was signed. The opinion of the witness on that subject is incompetent. And I make the further objection I made a while ago, that this libel

(Testimony of G. H. Carter.)

declares on this contract as it reads, without any suggestion that there is any ambiguity in it.

The COURT.—That is quite true, and there may be no ambiguity in it, but there may be a meaning attached to the words "June loading," "July loading," or "August loading," as the term may be used in shipping circles, that can be explained, that can be stated.

Mr. McCUTCHEN.—Then I think he should be asked for the specific statement of what they mean.

The COURT.—I was about to suggest that you had better ask him not what he understood by that, but what do the words "June loading," mean in a contract of this character.

Mr. McCUTCHEN.—That is it, your Honor.

Mr. HENGSTLER.—Q. What do these words, "Shipment per American S. S. 'Cacicue' June loading" mean?

Mr. McCUTCHEN.—I submit that the question ought to be confined to the words "June loading." That is the sharp issue, as I understand it now. The words "Shipment per American S. S. 'Cacicue'" have nothing to do with the interpretation of the words "June loading."

The COURT.—Well, answer the question in that connection, the meaning of those words as used in that contract. What is the ordinary meaning of the term "June loading," as used in shipping contracts?

A. Ordinarily, it would mean that loading would commence before the end of June. [160]

(Testimony of G. H. Carter.)

Q. Would commence before that time?

A. Yes, would commence before the 30th day of June, loading to be commenced, but in a contract of that kind, where the June loading was to fix the loading of the ship—

Mr. McCUTCHEN.—One moment; I object to that as not an answer to the question.

The COURT.—The objection is overruled; I want to know all about it.

A. (Continuing.) In a contract of that kind, where the contract was to guarantee June loading, that contract would also show a clause stating when the lay days would commence and what the cancelling date was; in other words, there would be two fixed dates.

Q. Ordinarily, then, a contract calling for June loading would be fulfilled if the ship began to load on the 30th of June?

A. Yes; that is my understanding.

Mr. HENGSTLER.—Q. Mr. Carter, was Mr. Davis informed at the meetings which you had with him with reference to the time when the "Cacicue" would make her first arrival in San Francisco after February 25th?

A. Yes; she was due in San Francisco sometime in March, from the West Coast of South America.

Q. That was explained to him?

A. Yes; the entire voyages of the "Cacicue" were explained to him up to the time when she was to make the voyage for this particular business.

Q. He understood, then, that the vessel should

(Testimony of G. H. Carter.)

not be loaded at that particular arrival of the vessel in San Francisco, did he not?

Mr. McCUTCHEN.—I suppose counsel means that that was stated. I think it would be much better if the witness were asked whether such a statement was made, and, if so, by whom. [161]

Mr. HENGSTLER.—Q. Was that stated to him?

A. Will you repeat that, please?

Q. Was it stated to him, or did he state that he did not desire the "Cacicue" for his automobiles on the next arrival of the "Cacicue" in port, after your conversations with him?

Mr. McCUTCHEN.—I object to that as immaterial and irrelevant.

The COURT.—Well, there does not seem to be any contention that he did expect to leave in March; the articles were not to leave the factory until May. It does not throw much light on it, but if counsel desires it you may answer the question, Mr. Carter.

A. Mr. Davis made no request for shipment on that first arrival of the vessel, but he knew that the vessel would be in San Francisco in March, but we were not able, had he wanted her, to have given her at that time.

Mr. HENGSTLER.—Q. Mr. Carter, I hand you a letter contained in a file which Mr. Moore identified yesterday as the office file of W. R. Grace & Co. in connection with the steamer "Cacicue." Have you seen that letter before? A. Yes.

Q. Was that letter received by you? A. Yes.

(Testimony of G. H. Carter.)

Q. At what time? A. On July 5th.

Q. It is dated July 5? A. Yes.

Mr. HENGSTLER.—We offer that in evidence, if your Honor please. Any objection?

Mr. McCUTCHEN.—I do not think we have any objection. That correspondence was long after the filing of this libel.

The COURT.—If you have none, I have none.

Mr. McCUTCHEN.—What is the purpose of it, Doctor?

A. It has a bearing upon some of the questions which you seem [162] to have raised; it is correspondence that followed afterward. I will withdraw it if you do not want it.

Mr. McCUTCHEN.—I am perfectly willing it should go in, but I do not see why it should be offered here and encumber the record.

The COURT.—I would have to see the letter; it could not have any effect unless it bears upon the amount of the damages. That might well be affected by many things that occurred after the filing of the libel.

Mr. HENGSTLER.—It is one of the series of letters which shows what arrangements were made between the parties for the purpose of minimizing the damages after the libel was commenced. It is only one of the series.

Mr. McCUTCHEN.—If that is the purpose, I do not think we have any objection.

Mr. HENGSTLER.—If, however, you will admit that steps were taken for the purpose of min-

imizing the damages, and that the libelant performed its duty in that regard, I will not offer the correspondence.

Mr. McCUTCHEN.—We have no objection, if that is the purpose of the offer.

Mr. HENGSTLER.—The letter reads as follows. It is on the letter-head of Mr. W. F. Williamson:

"July 5th, 1916.

"Messrs. Grace & Co. and
"Andros & Hengstler,
"Their Attorneys,

"Dear Sirs: [163]

"In response to your request for written confirmation of our previous offers, on behalf of the Ford Motor Company of Canada, Ltd., we tender you 4650 odd tons automobiles and parts for shipment at going rate of Thirty-five Dollars ($35.00) per ton of 40 cubic feet measurement on S. S. 'CACIQUE' to Wellington, New Zealand, and Sydney, Australia, as indicated on the packages. We are prepared to make immediate delivery alongside steamer when she is ready to load.

"As an alternative, we are also authorized to tender you for such shipment the said tonnage at $47.50 for each such ton provided you accept same in full settlement and satisfaction of all claims and demands against the Ford Motor Company of Canada, Ltd., this to be treated as an offer of compromise without prejudice to my client's rights or claims.

"Yours respectfully,
"W. F. WILLIAMSON."

(Testimony of G. H. Carter.)

The CLERK.—You do not want that marked as an exhibit?

Mr. HENGSTLER.—No. I understand that all of the correspondence that was read into the record is in evidence.

Q. What is your answer to that letter, Mr. Carter? A. Shall I read the letter?

Q. Yes.

The COURT.—Have you seen it?

Mr. McCUTCHEN.—Yes, your Honor, we have it. [164]

A. (Reading:)

"July 6th, 1916.

"The Ford Motor Company of Canada,
"c/o W. F. Williamson,
"Rm. 1112–1119 Merchants National Bank Bldg.,
"City.

"Dear Sirs:

"Referring to your favor of July 5th, we have never received from you any 'previous offers' save such as are contained in your written communications to us; therefore your letter is not a confirmation of any previous offer or offers.

"Referring to the proposition contained in the second paragraph of your said letter, it is hereby rejected.

"Referring to the proposition contained in the first paragraph of your said letter, we refer you to our letter and wire to you of date the twenty-sixth day of June, and advise you that we will take the

4650 odd tons automobiles and parts which you mention, to be immediately delivered alongside S. S. 'CACIQUE,' as fast as vessel can load at the rate of thirty-five dollars ($35.00) per ton of forty (40) cubic feet measurement for shipment to Wellington, New Zealand, and Sydney, Australia, as indicated on the packages, and hold you strictly responsible for all damages, including demurrage, which we may ultimately sustain by reason of breach of your contract with us of date February 25, 1916.

"By taking this quantity of automobiles, less than the quantity which you contracted to deliver, at the rate of thirty-five dollars ($35.00) per ton of forty (40) cubic feet measurement, which is lower than the rate which you contracted to pay for the whole amount contracted for, we do not accept such smaller quantity at such lower or any rate as a full satisfaction of said contract of February 25, 1916, but only for the purpose of minimizing damages; and by the acceptance of such smaller quantity we do not in any way release or waive any damages or demurrage due to breach of your contract.

"We do not admit, and on the contrary deny, that thirty-five dollars ($35.00) per ton of forty (40) cubic feet measurement is 'going rate.'

"Very truly yours,

"(Sgd.) W. R. GRACE & CO.

"G. H. CARTER,

"Sub-Manager." [165]

Mr. McCUTCHEN.—Let me suggest: There really won't be any issue between us, will there, as to the freight which the steamer did carry on its outward voyage, and as to the freight which she recovered or which was paid for that outward voyage?

Mr. HENGSTLER.—I don't know if there is any issue between us. That depends upon the position which you take.

Mr. McCUTCHEN.—I do not think so. I am inclined to think a memorandum could be prepared. You say in answer to one of the interrogatories propounded to you that she received freight from a number of shippers, and if you will prepare a memorandum showing what that freight was and the amount paid you by each shipper, I think we will take your assurance for it.

Mr. HENGSTLER.—All right. I thought Mr. Williamson, himself, desired to have that correspondence in.

Mr. WILLIAMSON.—No. As far as we are concerned, you can put it in or not, and let the reporter copy it without taking the time to read it.

Mr. HENGSTLER.—With your Honor's permission, that may be done. The further correspondence upon the subject, throwing light upon the entire transaction, is a letter of—

Mr. McCUTCHEN.—No, no. I understand his Honor has limited that to the introduction of letters for the purpose of minimizing the damages.

(Testimony of G. H. Carter.)

Mr. WILLIAMSON.—I just meant this bunch of letters that you were speaking of.

Mr. HENGSTLER.—Of course, that is one of the objects of offering it; I do not see how your Honor is going to segregate from it any statement made by either party in the correspondence; it will throw light upon what—

The COURT.—I could not tell that, Doctor, until I saw the [166] correspondence. Of course, if one of them should have written to the other, "I admit that this contract meant so and so, and that I misunderstood it," if you have a letter of that kind, of course, it is admissible.

Mr. HENGSTLER.—Well, I think it is proper for that.

The COURT.—I cannot pass on the correspondence in the dark. I don't know what it is at all.

Mr. McCUTCHEN.—I think Doctor Hengstler will state to your Honor that there is not any such letter as you suggest.

The COURT.—Of course, I stated that very broadly. I mean any letter that would throw any light on it, any admission against interest, anything of that sort; anything that would be admissible under the general rule of evidence.

Mr. HENGSTLER.—I think there is enough in the correspondence so that I will offer it for all purposes.

Q. What is the next letter in the correspondence?

A. You might look at this and see which one you refer to.

(Testimony of G. H. Carter.)

Q. What is the date of the next letter, and by whom was it written, and to whom was it addressed?

A. The letter of Mr. Williamson dated July 7th.

Mr. McCUTCHEN.—May I look at it? (After examination.) I would like your Honor to look at this letter. We have no objection to the first two paragraphs of it, but we do object to the rest of it, because it seems to be a discussion as to what the relative rights and obligations of the parties prior to the writing of the letter were.

The COURT.—That is just the matter that has been developed here in court, that is contained in this third paragraph, and that is what we are fighting about here, isn't it?

Mr. McCUTCHEN.—I return to my suggestion of a while ago: [167] It seems to me if counsel will make a list of the shippers, with the quantity of freight shipped by each, and the amount recovered from each, we will have no difficulty in agreeing upon it. That could be done on half a page of paper.

Mr. HENGSTLER.—My purpose in offering this correspondence is for what it is worth, to throw light upon the whole transaction, not merely for the purpose of minimizing damages. I do not see why there should be any objection to it.

Mr. McCUTCHEN.—My objection is that it is not addressed to the matter to which his Honor said he would limit this correspondence, that is to

(Testimony of G. H. Carter.)

say, minimizing the damages; it is long after the suit was brought.

Mr. HENGSTLER.—There is nothing in that correspondence that I am not willing to lay before the Court, and I do not really see why there should be anything in that correspondence that you would not be willing to lay before the Court.

Mr. McCUTCHEN.—I do not see the force of that sort of argument; if our objection is well taken, the letter ought to be excluded; if the objection is not well taken, it ought to be admitted.

The COURT.—The objection will be overruled.

Mr. HENGSTLER.—Q. Will you read the letter?

A. It is a letter from Mr. Williamson to W. R. Grace & Co., dated July 7th. (Reading:)

"July 7th, 1916.

"W. R. Grace & Co.,

"San Francisco, Cal.

"Dear Sirs:—

"Please advise us immediately when you propose to load the 4650 tons of automobiles which we tendered you for transportation [168] at $35. per ton as per our letter of July 5, 1916, and which you agreed to transport at that rate per steamer 'Cacique,' as per your letter of July 6, 1916.

"Although we have had 29 cars of automobiles on your dock, ready for loading by you, we note that you have not yet begun loading, and we are unable to place the remainder of the shipment on your dock for want of space. Our offer and your

(Testimony of G. H. Carter.)

acceptance provided for immediate loading, and we must know at once your intentions in the premises.

"We note that you propose to hold us strictly responsible for damages, etc., as per your letter of the 6th instant, but you understand, of course, that we deny all responsibility or liability under what you designate as the contract with you of date February 25, 1915, and that our agreement with you as expressed in our letter of July 5th, and yours of July 6th, is entirely independent of any such alleged contract.

"Yours truly,

"FORD MOTOR COMPANY OF CANADA, LTD.,

"By W. F. WILLIAMSON."

Q. What was your answer to that letter, Mr. Carter?

A. The letter of July 8th from W. R. Grace & Co. to Mr. Williamson. (Reading:)

"July 8th, 1916.

"Mr. W. F. Williamson,

"Merchants National Bank Bldg.,

"City.

"Dear Sir:—

"Referring to your letter of July 7th:

"Would advise that we instructed yesterday the Southern Pacific Railroad to deliver immediately to Pier #39 balance of 4650 tons automobiles covered by your tender and part of the cars have already been delivered to [169] the dock and are now being unloaded.

(Testimony of G. H. Carter.)

"Steamer will commence loading your cargo immediately after it has been assembled on dock.

"Yours very truly,

"W. R. GRACE & CO.

"Sub-Manager."

Q. What was the next communication you received?

A. Letter of July 10th from Mr. Williamson to W. R. Grace & Co. (Reading:)

"July 10th, 1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street, San Francisco, California.

"Dear Sirs:

"Your letter of July 8th was delivered on Saturday afternoon after business hours. We are now informed that the Steamer 'CACIQUE,' instead of fumigating, cleaning holds and immediately commencing the loading of our cargo following the completion of the discharge of her inward cargo, was, late Saturday afternoon, sent to drydock for the purpose of effecting repairs to hull and machinery.

"We again request that you notify us at once on what date you will commence to load our cargo if the same is to be shipped on the 'Cacique' so that we may determine whether, in view of our sales agreements and other obligations, we can await this new delay which it is obvious the drydocking of the 'Cacique' will entail.

"We note your instructions to the Southern Pacific Company and beg to state that we cannot,

(Testimony of G. H. Carter.)

without definitely knowing your plans, permit the disposition of cargo to different docks, from which we could not ship by other vessels. We are, therefore, instructing the Southern Pacific Company to immediately stop the movement of our goods to Pier 39 until further advices from us. [170]

"Yours very truly,

"FORD MOTOR COMPANY OF CANADA, LTD.

"By W. D. WILLIAMSON."

Q. What was your answer to that letter?

A. July 10th, a letter of Grace & Co. to the Ford Motor Company.

Mr. McCUTCHEN.—I do not see that any of this correspondence beyond the first letter has any bearing upon the question of minimizing the damages, your Honor.

The COURT.—Is that an objection, again?

Mr. McCUTCHEN.—Yes.

The COURT.—Overruled.

A. A letter of July 10th from Grace & Co. to the Ford Motor Co. of Canada: (Reading:)

"July 10th, 1916.

"The Ford Motor Company of Canada,

"c/o Mr. W. F. Williamson,

"Rm. 1112–1119 Merchants National Bank Bldg.,

"City.

"Dear Sirs:

"Replying to your letter of today's date, received this P. M.:

"We would point out that the delay in loading steamer 'CACIQUE' has been due entirely to your breach of contract and your instructions to the Southern Pacific not to deliver your shipment to the vessel. We regret to note from your letter under reply that you have again instructed the Southern Pacific to stop delivery, as this will result in further delay.

"We beg to say that we have been and are now endeavoring in every way possible to fill 'CACIQUE' vacancy left by your breach of contract to deliver 6200 tons cargo. Your tender of 4650 tons leaves some 1550 tons of space to be filled by us as best we can in order to minimize damages.

"The writer on several occasions advised Mr. Sutro, and we believe also advised you, that in view of the delay to vessel made necessary by your short tender and by [171] your stoppage of delivery of your shipment, which must be properly assembled on wharf alongside of vessel, we proposed to dock vessel and make sundry repairs which we had intended to effect in Sydney, thus further minimizing damages.

"We would point out that the ultimate sailing date of 'CACIQUE' has been and is in no way delayed by reason of this docking vessel for repairs referred to above; in fact it is manifest that when vessel commences loading on Wednesday, day after tomorrow, that further delay seems inevitable owing to the fact that you have again prevented your ship-

(Testimony of G. H. Carter.)

ment from being delivered by the Railroad Company.

"Yours very truly,

"W. R. GRACE & CO.,

"Sub-Manager."

Mr. HENGSTLER.—Q. What answer did you receive to that letter?

A. A letter of July 11th from the Ford Motor Co. of Canada, by Mr. Williamson, to Grace & Co. (Reading:)

"July 11th, 1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, California.

"Dear Sirs:

"We have your letter of the 10th instant.

"On the understanding, which we draw therefrom, that your Steamer 'Cacique' will commence loading our cargo tomorrow (Wednesday) and will prosecute such loading and her voyage with due diligence, we will direct the Southern Pacific Company this morning to continue the delivery of our cargo to Pier No. 39, as per your request. Our action in temporarily stopping the delivery yesterday afternoon until we could learn your definite loading date [172] was a reasonable precaution which could not in any way have delayed the loading of your vessel, which is still in dry dock, while you have had her cargo delivered in part at different piers. One of these piers, No. 26, is literally blocked with the inward cargo of the vessel.

"We are advised by Mr. Sutro that you mentioned repairs to him on only one occasion and then by telephone on Friday, June 30th, after our conference in the afternoon of that day, looking toward a settlement of the difference between yourselves and the Ford Motor Company of Canada, Ltd., growing out of what you term the 'contract of February 25, 1916.' You asked him whether the delay of a day or two to make repairs would interfere with the proposed settlement and he replied that he thought it would not. We had no knowledge of your purpose to dry dock this vessel and were greatly surprised to learn that you had done so in view of your engagement of July 6th for the shipment of our cargo.

"Noting the first two paragraphs of your letter of July 10th, we most emphatically deny that we breached any contract of carriage with you, either by our directions to the Southern Pacific Company, or in any other manner. No action of ours was responsible for your delay in loading the Steamer 'Cacique.' As you well know, the vessel was not ready to load her cargo in the month of June and in fact is not yet ready to do so.

"We note your efforts to obtain further cargo for this vessel but while we hope you can do so for your own interests, the loading and carriage of the 4650 tons tendered by us and accepted by you must

(Testimony of G. H. Carter.)

begin tomorrow, Wednesday, and proceed with due diligence.

"Yours very truly,

"FORD MOTOR COMPANY OF CANADA, LTD.

"By W. F. WILLIAMSON." [173]

Q. Was there any further correspondence after that? A. Apparently not, from this record.

Q. When did the loading of this substituted cargo commence?

A. I don't know at all other than it would appear from this correspondence—

Mr. McCUTCHEN.—I object to that.

Mr. HENGSTLER.—It commenced on July 10th; I believe that is admitted, is it not?

Mr. WILLIAMSON.—No, it commenced on July 12th, after she came back from the drydock. That is set forth in the answer to the interrogatories.

Mr. HENGSTLER.—July 12th; I was mistaken; I meant July 12th; that is admitted, that she commenced to load at that time?

Mr. WILLIAMSON.—July 12th.

Mr. HENGSTLER.—That is all.

Mr. McCUTCHEN.—Doctor, you were requested to produce any communications that Grace & Co. had from its agents in Hongkong, or Shanghai, or Vladivostok, or from the captain of this ship, prior to the arrival of the ship here on the 27th of June. Have you any such?

Mr. HENGSTLER.—I have not received any such request. I was not served with that request.

(Testimony of G. H. Carter.)

Mr. GRIFFITHS.—It was served at your office last night.

Mr. HENGSTLER.—I have not seen it, if it was in my office.

Mr. GRIFFITHS.—I talked with Mr. Single about it last night.

Mr. HENGSTLER.—What time last night?

Mr. GRIFFITHS.—After the adjournment of court.

Mr. HENGSTLER.—I did not return to my office until half-past [174] seven.

Mr. McCUTCHEN.—It was not called to your attention?

Mr. HENGSTLER.—It was not called to my attention.

Mr. McCUTCHEN.—Will you produce it?

Mr. HENGSTLER.—We will produce anything that Mr. Carter has got in his office. What is it you want?

Mr. McCUTCHEN.—I will proceed with the examination of the witness now.

Cross-examination.

Mr. McCUTCHEN.—Q. When did you first know the date, or the approximate date, on which the "Cacique" would arrive in San Francisco from its voyage to Vladivostok?

A. I do not know, but we will have records which will show, presumably in a cable.

Q. From whom?

A. Either from the captain or agent.

(Testimony of G. H. Carter.)

Q. Would that probably be in a cable, or in a wireless?

A. Either one or the other, probably a cable.

Q. Did the ship have a wireless apparatus?

A. Yes.

Q. This is speculation to some extent, but from what port would that cable come—from Honolulu?

A. No; we would first receive a cable when the vessel sailed from China, and either that cable would give the captain's expected date of arrival, or we would figure from that sailing date when he should arrive.

Q. To whom did the captain report when the ship reached port here on the morning of the 27th?

A. You mean who to in the office?

Q. Yes.

A. He would report to the steamship department.

Q. Did he report to you? A. No.

Q. Did you know he had arrived?

A. Yes. [175]

Q. You knew that on the morning of the 27th?

A. Yes.

Q. There had been some rather sharp controversy between you and the Ford Company with reference to your obligations under this contract, had there not? A. Yes.

Q. So you were naturally concerned with the time when the ship would arrive, and you had that in mind up to the time when she actually arrived?

A. Yes.

Q. Did you learn immediately after the captain

(Testimony of G. H. Carter.)

or the ship reached port that she had met with some damage on her return voyage?

A. Within a very short period I heard, probably a day or so.

Q. Did you not hear on the 27th?

A. Possibly.

Q. Did you not hear almost immediately after the ship arrived?

A. No, I do not think so. I might possibly have heard. But the damage was not such that it would make it imperative that I would be advised.

Q. Did you learn subsequently what the damage was? A. Yes.

Q. You state in one of your letters written after this libel was filed that the damage was of a nature that you would have repaired when she was in Sydney or Australia?

A. Yes, we were arranging to do that.

Q. You were arranging to do that? A. Yes.

Q. Would you have allowed that ship to go out of this port in the condition she then was?

A. Yes.

Q. Would Lloyd's have allowed her to go out?

A. If Lloyd's wouldn't we couldn't; in other words, we would have to have a seaworthy certificate for her to said.

Q. Was she afterwards classified by Lloyd's?

A. Lloyd's must have passed on the repairs when they were made here.

Q. Did you at any time call in Lloyd's?

(Testimony of G. H. Carter.)

A. That I don't [176] remember; I have no doubt we did.

Q. Did you get a survey from Lloyd's representative here?

A. I am sure we did; if we called them in we certainly did get the survey.

Q. Did you not know on the morning of the 27th of June that that vessel could not take on a pound of freight during the month of June?

A. No. The difficulty was this: Normally, we could have discharged that cargo on the 27th, 28th and 29th, in time to commence loading on the 30th, but with this strike which had come up within a few days prior to the arrival of this ship, I am not at all certain that that could have been done.

Q. Are you in doubt about that? A. Yes.

Q. You think you might have been able to begin loading on the 30th? A. Yes.

Q. Now, I understand you to say that the words "June loading" mean that you could begin to load at the last minute of the last day of June?

A. Well, that is a point which has been argued among shipping men for a long time.

Q. No, I am not asking you that. You have told us what those words mean.

A. Yes, if you start loading on the last date you make a June loading; that is as compared with a June shipment, which means that the vessel must complete within the month stated.

Q. You stated, in answer to his Honor, as I understood you, that if you began loading on the last

(Testimony of G. H. Carter.)

day of June you complied, in that respect, with the contract? A. Yes.

Q. That means the last minute of the last day of June, does it?

A. It means some time on the last day of June.

Q. Will you answer my question, Mr. Carter? You are here as an expert on that subject. I ask you if that means the last [177] minute of the last day of June?

A. It means to commence loading—

Q. Won't you answer my question and then make your explanation?

A. Yes; it means to commence loading during any time in June.

Q. On the morning of the 27th of June, and before this libel was filed, did you not know that the "Cacicue" could not take on a pound of freight, even up to the last minute of the last day of June?

A. No.

Q. Did developments subsequently take place which satisfied you that the ship could not take on any freight before the last minute of the last day of June? A. Yes.

Q. You say that on account of the pendency of this strike—I think nothing has been said about a strike heretofore, because Mr. Moore said he knew nothing about it; tell the Court, please, what the strike condition was?

A. It was one of our longshoremen's strikes, and the conditions were bad, as they always are on such occasions; on the other hand, we were willing to get

(Testimony of G. H. Carter.)

sufficient men to discharge this cargo during these three days which we had, if possible.

Q. "These three days which we had": That is to say, under this contract as you interpret it?

A. No, not as I interpret it, but as you interpret it.

Q. As we interpret it? A. Yes.

Q. You have said that you could begin on the last day of June.

A. Not under this contract; my position is that we could have begun on any day in July, or even later, under this contract.

Q. Or August?

A. Time, of course, must be reasonable. I should say that beyond sixty days, in my opinion, would be unreasonable.

Q. You said a while ago you understand the words "June loading" [178] to mean to begin loading in June? A. Yes.

Q. Do I understand you now to say you do not mean that?

A. No. The words alone, "June loading," mean to begin loading in June; but in this contract the words "June loading," in my opinion, do not mean to begin loading in June, it simply shows the loading of the vessel.

Q. In other words, the words "June loading" in this contract mean something different from what they would mean in any other contract?

A. Not any other, but in many others.

(Testimony of G. H. Carter.)

Q. Most others—most others that you know anythink about?

A. "Most others" is quite correct; but the "all most others" that you refer to, the time would also be shown in the contract, the lay days the vessel would start to load, and the date of cancellation.

Q. But the house of Grace & Co., when it drafted this contract, did not think it necessary to put any of those contingencies in the contract, or to provide for any of those contingencies in the contract?

A. No; the contract was drawn at a time when all business, particularly in shipping, was as brief as possible; you will rarely see a contract as brief as that contract before you.

Q. Was it also brief as to demurrage?

A. It is brief in language, perhaps not in amount.

Q. Then this contract differed from the ordinary shipping contract, as I understand it?

A. It differs from many.

Q. Answer the question, please. This contract differs from the ordinary shipping contract, as I understand it? A. Yes, it does.

Q. This is the first contract of this kind that you ever saw worded as this contract is?

A. Yes. [179]

Q. You say that you tried to discharge the cargo within these three days which we had, if possible; What was it that induced you to try to discharge the cargo witin those three days?

A. For the reason that the Ford Motor Co. were to base their case, their argument with us, precisely on

(Testimony of G. H. Carter.)

that point, and while I personally did not believe that their position was correct, I at the same time wanted to avoid that point if possible.

Q. You continued your effort to discharge the cargo, didn't you?

A. Not beyond a very short—not beyond the very first day; I think by that time the split had occurred between us, and we knew it was impossible to go ahead at all.

Q. And then you let up in your effort to discharge the cargo?

A. Yes; in other words, we did not do the work which we could have done had the dispute not arisen.

Q. How many tons did you discharge the first day?

A. I have no idea. I have not any of the figures in my head at all.

Q. Do you remember verifying some answers to interrogatories in this case? A. Yes.

Q. You remember the fact, do you? A. Yes.

Q. Let me ask if you did not answer this question as follows:

"Q. What was the total quantity of cargo discharged from said steamer on each of the days during which said cargo was unloaded?

"A. There is no record in existence; it is therefore not possible to answer this question for each day of the discharge; an approximate calculation of the average discharge per day gives 643 tons; the actual discharge was slow and intermittent, on ac-

(Testimony of G. H. Carter.)

count of the prevailing strike of longshoremen and the consequent necessity of employing incompetent nonunion labor; had there been no strike, and competent stevedores available, [180] the steamer could have been completely discharged before June 30.''

A. Yes.

Q. You say now that you let down in your efforts to discharge the steamer? A. Exactly. This is—

Q. One moment: Do you say now you let down in your efforts to discharge the steamer?

The COURT.—Let him answer the question.

A. Exactly. We could have secured more men had it been necessary, but in my opinion we could not have secured enough men to have completed that discharge in June, on account of this strike.

Mr. McCUTCHEN.—Q. Then we may take it for granted in this case that with all the energy you could have displayed you would not have been ready to take freight on board that steamer before the end of June?

A. Not with the steamer with clean holds; we could have commenced loading in her 'tween-decks, which had been discharged, which procedure I had considered.

Q. Was the steamer subsequently fumigated?

A. Yes.

Q. Could you have begun loading her before she was fumigated?

A. Yes, we could fumigate with cargo on board.

(Testimony of G. H. Carter.)

Q. Do you know what material is used for fumigation? A. Cyanide.

Q. Would you put on board a shipment of automobiles and subsequently use cyanide of potassium for the fumigation of that part of the ship in which the automobiles were?

A. Yes, we were going to.

Q. Have you ever known that to be done?

A. No.

Q. Could your men have been working there while that fumigating process was going on?

A. No. [181]

Q. Then you would have suspended the loading operations entirely, would you, while that was being done?

A. Either have done it after complete loading, provided we were satisfied there could be no damage, or it would have been necessary to suspend loading.

Q. How much time was required for the fumigation, and when did the fumigation take place?

A. If my memory is correct, about overnight is required for fumigation by the cyandide process; I should say half a day. I may not be correct.

Q. What was the condition of the ship with reference to cargo on board at the time the fumigation actually took place? A. That I do not know.

Q. Don't you know there was no cargo on board when she was fumigated?

A. I would infer there was no cargo on board.

Q. And don't you know that that is the usual

(Testimony of G. H. Carter.)

course? A. Yes, it is the usual course.

Q. When did she go to the drydock?

A. I think, from reading the few letters there a moment ago, it was July 5. It was Saturday. It speaks of her going on Saturday.

Q. Is it not the fact that she went to drydock on the 8th? A. That I cannot tell.

Q. Did not the unloading continue as rapidly as it was possible for you to proceed with it from the day when it commenced up to the time that she went into drydock?

A. We could have secured more men, but it was doubtful at that time whether it would have been of any particular advantage.

Q. Why?

A. Men were scarce; they were needed by all the steamship companies, and unless we were making some vital drive for a particular point, we did not want to take more than our proper quota of men from our associate companies. [182]

Mr. McCUTCHEN.—I may suggest to your Honor, and I think Doctor Hengstler will agree, that the answers to the interrogatories, as to when the ship went to drydock, show that she went on the 8th of July.

Mr. HENGSTLER.—Well, whatever is stated there will be taken as correct. If you say that that is what is stated there, that that is what the record shows, that will be taken as correct.

Mr. McCUTCHEN.—Q. What happened, as between you and the Ford Company, after the ship

(Testimony of G. H. Carter.)

arrived here on the morning of the 27th and the filing of this libel on the afternoon of the 27th?

A. What happened—I don't understand the question.

Q. Did you come in contact with anyone representing the Ford Company between those hours?

A. That I don't remember.

Q. Is it not a fact that after a consultation with the counsel for Grace & Co., and after advising the counsel that you could not load a pound of freight on that ship during the month of June, that you concluded to file this libel? A. No.

Q. You did not know, then, at the time you filed the libel, that you could not load any freight in June?

A. We did not know that it would be impossible to load freight, part of the cargo, in the 'tween-decks, for instance. I had despaired that we would be able to discharge the vessel with the men that we probably could get.

Q. Were you in doubt, on the 27th of June when you filed the libel, that you would be able to load any cargo on the ship during the month of June?

A. No; we expected to load part of it during the month of June.

Q. At the time you filed the libel? A. Yes.

Q. How much did you expect to load during the month of June, at the time you filed the libel?

A. Very little. [183]

Q. Well, as an outside quantity, how much?

A. My idea was that we would—

(Testimony of G. H. Carter.)

Q. Answer the question, please. Well, you are answering it, go ahead.

A. My idea was that we could clean out possibly two 'tween-decks of the vessel of the inward cargo, and load those 'tween-decks with these Ford cars before June 30th, and establish this point of June loading.

Q. Well, that would have been—without wanting to be offensive—just a piece of camouflage, wouldn't it?

A. I have never seen it done before, and whether in would be effective, I am not at all sure.

Q. That would, at most, taking your opinion of it, have been a pretense at performance, and that only, wouldn't it? A. I would hardly say that.

Q. Well, it would not have been in your opinion, as you look at it now, a genuine beginning of loading, would it?

Q. Do you mean legally, or actually.

Q. No, I mean in your view of it, looking at it as a common sense proposition.

A. It would be a genuine loading, providing you could have completed loading by doing so.

Q. Don't you know that if you had tried anything of that kind your loading would have been delayed?

A. Not necessarily delayed, but it is very probable that it would not have been increased.

Q. Then if it could not have been increased, it would have been a pretense? A. Exactly.

Q. When the ship arrived on the morning of the

(Testimony of G. H. Carter.)

27th, did not the captain tell you she was in a leaky condition? A. No.

Q. He did not?

A. No; I don't remember seeing the captain for several days.

Q. Didn't your dock superintendent tell you she was in a leaky [184] condition? A. No.

Q. Did anybody?

A. I heard at some time, I cannot place the date, whether it was within those first few days that she arrived, or not, that the vessel had leaked somewhat in her forepeak; this is from memory entirely now, and I have not looked it up and I am not certain of it, but as I remember it there was a slight leak reported in her forepeak, which leak normally would be very little to a shipping man; a leak in a forepeak amounts to practically nothing, provided it is slight, only.

Q. Don't you know that Lloyd's sent her to the drydock for that leak, and they would not have given you a certificate for the ship to go out on another voyage in her then condition? A. No.

Q. Did you talk with anyone representing Lloyd's on that subject?

A. No, but I must have discussed it with the head of our Steamship Department.

Q. Who is he?

A. Probably a man named Eggers. We have had several different steamer men. I cannot be sure.

Q. Well, you discussed it with somebody, and you

(Testimony of G. H. Carter.)

don't know now who that somebody is: Is that right?

A. Yes. Anyway, it would be the man who would naturally bring it to me in the office.

Q. I think that that must be very apparent, Mr. Carter. You cannot aid us in telling us who that man is?

A. I can find out later who that man would be.

Q. Were you advised or told by your dock superintendent, on the day on which this vessed arrived here and before you filed this libel, that she had sprung leaks on her return voyage from Hongkong?

A. That I don't remember. [185]

Q. For what reason did this ship go to drydock?

A. She went to drydock to make repairs to cover the damage which had happened on her voyage over here.

Q. When was it first determined that she should go to drydock?

A. I cannot remember what decided us to drydock the steamer here finally, instead of at Australia.

Q. Don't you know that it was common report on the dock where this steamer was discharging, from and after the moment that she arrived, that she would have to go to drydock before going out on another voyage? A. No.

Q. You received, did you not, from the Ford Motor Co. of Canada, during the month of June, a letter in which that corporation stated that they understood you had taken out a clearance for this vessel in July? A. Yes.

(Testimony of G. H. Carter.)

Q. Was that true, that you had taken out such a clearance?

A. No, we would not take out a clearance so far in advance.

Q. Had you determined at that time, about the time of the receipt of that letter, that the vessel would not go out until July? A. I think so.

Q. What date in July?

A. I do not remember; it would be an early date.

Q. When was it, Mr. Carter, that you first reached the conclusion in your own mind that this ship could not take on any substantial quantity of cargo during the month of June?

A. By "substantial," do you mean any? My only object was to take on, if possible, enough cargo to cover the point which was being raised by the Ford Motor Co., that she must commence loading in June. That amount of cargo would need be, in my opinion, very little.

Q. I think I asked you to state the number of tons, and I do [186] not think you answered that question; will you now tell us the number of tons which should be on board in June in order to cover your obligation in that respect?

A. I don't think it is a matter of tons, I think a very few packages would do it.

Q. Then your intention was to put on very few packages? A. Yes; as many as possible.

Q. Well, as a maximum, how many?

Mr. HENGSTLER.—He said before, Mr. McCutchen, two 'tween-decks.

(Testimony of G. H. Carter.)

Mr. McCUTCHEN.—Q. As a maximum, how many packages?

A. I should say that two 'tween-decks clear, we would put on that ship several hundred tons.

Q. On the 28th day of June, and up to the end of that period, you had not been in a condition to load any freight on to the "Cacicue," had you?

A. No.

Q. And yet, on the 28th you wrote a letter to Ford & Co. stating that they had delayed the ship in its loading, and were therefore liable for demurrage at $3,000 a day, didn't you? A. Yes.

Q. Why did you write that letter?

A. Because they had delayed the ship. A vessel's cargo must be delivered in time to properly segregate it so that it can be properly loaded.

Q. You had told them in a previous letter, had you not, that they should begin to deliver their cargo at the dock on the 2th and have it completed by the 29th? A. Yes.

Q. Now, you knew when you wrote the letter of the 28th that it was extremely doubtful the ship would be able to take on a pound of freight in June, did you not?

A. Not a pound, I would not say that.

Q. Well, any substantial quantity, we will put it.

A. Not any more than several hundred tons, yes. [187]

Q. At that time there were on the dock in the neighborhood of 2500 of 2600 tons of Ford freight, were there not?

(Testimony of G. H. Carter.)

A. That I don't remember, but I think not.

Q. I am corrected. I am told 1500. You think there were not 1500 tons there?

Mr. HENGSTLER.—It was not 1500 tons, either.

A. I think not. It seems to me it was a much smaller quantity.

Mr. McCUTCHEN.—Q. How much?

A. My recollection was there was but a very few hundred tons delivered.

Q. You allege in your libel in this case, which you verified, that the Ford Company had on the 23d or 24th delivered 1100 tons on the dock, do you not?

Mr. GRIFFITHS.—1100 packages?

Mr. McCUTCHEN.—1100 packages.

A. Possibly; I don't remember.

Q. You were the representative of Grace & Co. in all this business, were you not? A. Yes.

Q. You knew what you were doing when you verified this libel, didn't you? A. Yes.

Q. Now, bearing in mind that you have stated that you would only have put on a few hundred tons during the month of June, I ask you whether you don't know that there were many more than a few hundred tons on the dock, placed there by the Ford Company, prior to the 26th of June? A. Yes.

Q. Then I ask you again, what did you mean in your letter of the 28th by saying the Ford Company had delayed you?

A. I mean that they had delayed us; in other words, the cargo could not be loaded direct from cars into a steamer and give that steamer the requi-

(Testimony of G. H. Carter.)

site loading; in other words, a cargo should arrive prior to the date of loading, in sufficient quantity to enable it to be [188] segregated and loaded properly into the ship.

Q. Going back again, you know you had asked for this cargo to be there by the 29th? A. Yes.

Q. So when you filed the libel on the 27th the Ford Co. had still 48 hours, or approximately that, to comply with your request to deliver the cargo?

A. They must have.

Q. They must have? A. Yes.

Q. And none the less you filed the libel on the 27th? A. Yes.

Q. You say you had not been told by your counsel in your interviews with him, or that you had not appreciated, yourself, that Grace & Co. were in a delicate situation, and was itself in a situation where it might be called upon for the payment of damages for breach of this contract? A. No.

Q. That never was suggested to you?

A. Not in the least. I do not see how we could have been called upon for damages.

Q. When you filed this libel—I call your attention to the signature "J. H. Carter."

A. Yes, that is mine.

Q. To the verification of this libel; that is yours?

A. That is mine.

Q. You knew what you were signing when you signed the verification? A. I did.

Q. You read the libel before you signed it?

A. Yes.

(Testimony of G. H. Carter.)

Q. You stated that at the time you filed the libel there were 1100 packages belonging to the Ford Motor Company on the dock and ready for shipment thereon, that is, for shipment on the steamer "Cacicue"?

Mr. HENGSTLER.—Is there any "1100" in there it is 1094, isn't it?

Mr. McCUTCHEN.—You changed it to 1100, Doctor.

Mr. HENGSTLER.—It is not changed in my copy, so I didn't know.

Mr. McCUTCHEN.—There is no notation, but, of course, it was [189] changed before the trial.

Mr. HENGSTLER.—It does not make any difference.

Mr. McCUTCHEN.—Read the last question. (Last question read.)

Q. You mean for shipment on the steamer "Cacicue"? A. Yes.

Q. Can you give the Court some impression about how many measurement tons, if I may use that expression, were represented in that 1100 packages?

A. Personally, I do not know, but it can be readily figured.

Q. You have no impression about that?

A. No, none.

Q. Would you say that that probably represented at least 1500 tons?

A. It might; if the packages measured over 40 cubic feet a ton, yes, it would.

Q. Would you say there were at least that?

(Testimony of G. H. Carter.)

A. Let us say that there were.

Q. I do not care to put it that way. Will you say there were at least 1100 tons?

A. No, as I have no idea of the size of those packages.

Q. Was that as much freight as you would have put on the "Cacicue" for the purpose of making this pretense which you have spoken of?

A. It was you that spoke of the pretense.

Q. I do not use that offensively, Mr. Carter.

Mr. HENGSTLER.—He wanted to meet your own views.

Mr. McCUTCHEN.—Is that as much freight as you would have put on the "Cacicue" in order to make this showing of a commencement of loading?

A. Yes.

Q. And more, is it not? A. Very probably.

Q. It is suggested to me by my associates to again ask you about how many tons you could have put in the 'tween-decks that you have spoken of?

A. My memory is not good enough to tell you that. [190]

Q. At any rate you know it was a quantity much smaller than that represented by this 1100 packages?

A. I should say this: That while we probably could put this entire quantity into all her 'tween-decks, that doubtless all her 'tween-decks would not have been empty. In other words, I think that was sufficient cargo to have loaded in that ship in June.

Q. Now, notwithstanding that, you sat down and

(Testimony of G. H. Carter.)

deliberately indicted a letter to the Ford Company stating they had delayed the loading of the "Cacicue," did you not?

A. Yes. As I have explained twice, they delayed the loading of the cargo in not having the cargo there a sufficient time prior to the loading.

Q. Did you go down to the ship's side at any time during that unloading operation? A. No.

Q. Do you know to what extent that dock was strewn with cargo? A. No.

Q. While the unloading was going on?

A. No, I did not see it, but I could imagine it.

Q. What was the occasion for the fumigation of this vessel?

A. If my memory is correct, it was a necessary port ruling that she must be fumigated.

Q. Because of the port from which she had come?

A. Yes.

Q. There was no escaping from it?

A. No, not with any propriety.

Q. When these packages were delivered by the Ford Co. on the dock, for what purpose were they delivered? A. To be loaded on the ship.

Q. On the "Cacicue"? A. Yes.

Q. Referring again to your letter of the 28th, stating to the Ford Co. that it would be liable for demurrage of $3,000 per day, what was the purpose of writing that letter?

A. It is always [191] necessary to establish demurrage to write to the shipper; in fact, it is a regular custom.

(Testimony of G. H. Carter.)

Q. There was offered here yesterday, Mr. Carter, a letter written on the 26th of June, in which was set forth a telegram sent to the Ford Motor Co., of Canada, by Grace & Co., on that day. Mr. Moore said that he wrote that letter pursuant to the instructions of some superior. You were his superior, were you not? A. Yes.

Q. So that you knew about the writing of the letter of June 26th, didn't you?

A. I could tell if I saw it. (After examination.)

A. Yes, I know this wire.

Q. When you sent that wire, did you know that there were 1100 tons of freight on the dock—1100 packages?

A. It is quite probable, but we also knew that the Ford Motor Company had instructed the railroad not to deliver the automobiles, and the automobiles had been delivered by mistake by the railroad.

Q. They were, none the less, there?

A. Yes, they were there.

Q. Ready, as you say in your libel, to be loaded on a ship?

A. Yes, providing we were not prevented by the Ford Motor Co.

Q. You had not been prevented up to that time?

A. No.

Q. So that you knew at that time that the Ford Motor Co. had actually delivered 1100 packages, or thereabouts, of the freight which you in this telegram of the 26th of June demanded it should deliver?

(Testimony of G. H. Carter.)

A. Yes, but also knew it was delivered by mistake.

Q. That is, it was not intended as freight for the steamer?

A. No, it was not the intention of the Ford Motor Co. to give us that freight.

Q. And it was not received by you as freight?

A. It was received as freight.

Q. It was received as freight?

A. It was received as freight. [192]

Q. Then you had it as freight? A. We did.

Q. At the time you wrote the letter of the 26th, and at the time you filed the libel? A. Yes.

Q. And you thereafter, as set forth in this libel verified by you, proceeded to foreclose a maritime lien upon that 1100 packages of freight?

A. Yes. The railroad at that time was requesting us either, as I remember it, to return or permit them to take away that cargo; they claimed they had made an error in delivering it to us; we naturally, when we placed our libel, libeled everything we could find of Ford.

Mr. McCUTCHEN.—Your Honor understands that so far as this feature of the case is concerned, this is a libel *in rem.* The respondents are the Ford Motor Co. of Canada, Ltd., a corporation, and certain automobiles and parts in packages.

Mr. HENGSTLER.—It is a libel in foreign attachment and a libel *in rem,* too.

Mr. GRIFFITHS.—A libel *in rem* and foreign attachment.

Mr. HENGSTLER.—I don't know what differ-

(Testimony of G. H. Carter.)

ence there is. A libel on any foreign attachment is a libel *in rem.*

Mr. GRIFFITHS.—A writ of attachment—

The COURT.—What is this discussion about? Let us finish the testimony.

Mr. HENGSTLER.—I don't know what the point is.

Mr. McCUTCHEN.—Q. You suggested about some information with reference to the railroad company. Can you state to us in what way, I mean specifically, that delayed your operation or interfered with your loading of this Ford cargo?

A. Do you mean the loading of the entire cargo?

Q. Any part of it.

A. Or the loading of part?

Q. Any part of it.

A. The loading of any part of the cargo [193] was not delayed, provided we could have loaded without restraint that cargo which was on the dock.

Q. What did the railroad company do between the date of the delivery of that cargo on the dock and the time when you filed this libel, which interfered in any degree with the loading of those packages on the steamer?

Mr. HENGSTLER.—May I refresh the witness' recollection with reference to that?

A. I think they wrote us a letter.

The COURT.—If you have some document there that will show it.

A. Here is a letter from Davis to the Southern Pacific.

(Testimony of G. H. Carter.)

Mr. McCUTCHEN.—Read my question.

(Last question repeated by the reporter.)

You have a letter there of *of* the 22d of June. You allege in your libel that that freight was delivered on the 23d and 24th of June. My question is, what was done between the date of the delivery of those packages and the filing of the libel?

A. We received a letter on June 27 or 28 from Mr. Herrin, of the Southern Pacific, enclosing this letter from the Ford Motor Co.

Q. Now, you say the 27th or 28th.

A. Yes. This is dated the 27th. I don't know when we got it.

Q. My question is confined to the time that intervened between the delivery of the packages—

A. (Intg.) Which was what date?

Q. (Continuing.) Was the 23d or 24th—

A. (Intg.) And the 27th?

Q. And the 27th, when you filed the libel.

A. I presume at that time we had this letter.

Q. You don't know whether you had or not?

A. I think the letter—I am very positive that the letter was to confirm several [194] telephone communications from the Southern Pacific.

Q. Do you know when that letter came to your office, by the way? A. No.

Q. I submit we ought to have that. You have a file with a stamp on it.

A. I think we can find the original showing when that came in.

Q. I think we ought to have that. You will have

(Testimony of G. H. Carter.)

time to get that during the adjournment.

Mr. HENGSTLER.—Ask him to the best of his memory, and he will give it.

A. Of course, it is rather difficult, this is 1916—this is supposed to be a complete file, and the originals of this file may be in our archives; it may take a little while to get it.

Mr. McCUTCHEN.—Q. We prefer that you endeavor to get it.

A. Yes, we will be glad to do it.

Q. When the ship left here for Australia, did she carry oil or water in her No. 2 deep tank, or No. 2 double bottom?

A. She undoubtedly carried oil in her deep tank; her double bottom, I am not sure; I suppose she carried oil there also. The records will show.

Q. Was it necessary for her to carry oil there in order to make the voyage to Australia?

A. That I do not know.

Q. You don't know whether she would have had sufficient fuel to take her on that voyage to its end, unless she carried oil in her double bottom?

A. No, I do not know without looking up the records.

Q. Do you know whether, when she arrived here on the 27th of June, she could have carried oil in her double bottom?

A. No, but I infer that she could.

Q. You infer that she could? A. Yes. [195]

Q. Don't you know that she was permitted by Lloyd's surveyor to come from Hongkong to this

(Testimony of G. H. Carter.)

port only upon the understanding that she should not carry oil in that double bottom?

A. No, I don't remember.

Q. You don't remember that?

A. In fact, I am quite sure I never heard of it.

Q. Is not that embodied in an answer made by you to one of the interrogatories propounded to you?

A. Possibly, but I don't remember it.

Q. And being at the head of the shipping department of Grace & Co., you cannot tell us now whether that ship could have gone to Australia if she had not been able to carry oil in her double bottom?

A. As I remember it the vessel had—and this is from memory only—about 1,500 tons capacity in her deep tank, and I am quite positive that she needed additional space in her double bottom for that fuel.

Q. Did you learn, after the vessel arrived here, that on her voyage from Hongkong she did not carry oil in her double bottom?

A. Possibly, but I don't remember it.

Q. You might have learned that on the morning of the 27th, and before you filed this libel?

A. No, it is very unlikely.

Q. Very unlikely? A. Very unlikely.

Q. Is it very unlikely that everybody connected with Grace & Co. should have been ignorant about that?

A. Very possibly; in other words—

Q. Just a moment; I think I framed that ques-

(Testimony of G. H. Carter.)

tion so as to get a double negative there. I mean is it likely?

A. The captain of the vessel, of course, would know, and he undoubtedly would discuss it with our Steamship Department, who met the vessel.

Q. And he would do that very promptly after the vessel arrived, [196] would he not?

A. Probably.

Q. And the Steamship Department would notify you, as the manager?

A. In due course; I might not be notified for some days. I would be notified when the point was brought up as to whether or not repairs were essential for that vessel before she left port.

Q. Would the captain advise some one of your heads of department that Lloyd's had imposed, as a condition to allowing the ship to proceed on its voyage from Hongkong to San Francisco, that she should not carry oil in her double bottom?

A. Probably.

Q. And now do you say that the head of the department to whom that information came might not convey it to you for days?

A. He might not for some time. Normally, such advice would be received fairly promptly, but during the three years of 1916, 1917, and 1918, when there were abnormal business conditions, frequently points like that would not be brought to our attention.

Q. Mr. Carter, who is the man in Grace & Co. who could tell us about that?

(Testimony of G. H. Carter.)

A. The head of the Steamship Department.

Q. And who is he?

A. I think it was Eggers.

Q. Is he still with you?

A. No, he is with the Pacific Mail, I think: he is right in town. We can readily find out who the head of the Steamship Department was, and what the captain told him regarding repairs, if you want that point settled clearly; that will be very easy.

Q. You have said, as I understand you, that you would have allowed that ship to proceed on her voyage to Australia without having any repairs made upon her?

A. Yes, that was our understanding regarding the damage which she had suffered; in other words, the damage was considered so little that repairs were not necessary.

Q. You stated, in answer to one of these interrogatories, that [197] you would have had those repairs made in Australia, did you not?

A. Yes; and we were arranging to have them made there; in fact, we intended to.

Q. These answers to interrogatories were signed long after the ship had left here, were they not?

A. Yes.

Q. You must have known, before the ship left here, whether she could carry oil in her double bottom, didn't you? A. Yes.

Q. And you say that, assuming she could not carry oil in her double bottom, you would have allowed her to go to sea on a voyage to Australia?

(Testimony of G. H. Carter.)

A. I would have, provided her deep tank had been able to hold sufficient oil to take her there, and I have no recollection what it holds.

Q. Did you ever hear that the center line bulkhead of her deep tank was strained and had started?

A. Not that I remember, other than that may have been discovered when she was docked.

Q. Did you look at the report of Mr. Blackett, Lloyd's surveyor, which is attached to your answers to interrogatories, before you signed and verified those answers?

A. I had the steamerman read over the report to me as I ran through the various questions, to show that they covered the report; in fact I think he had already checked the answers with this report, and he read it over to me. We had no intention in the answer to minimize the damage whatever, because that was fixed, that was an open record.

Q. Do we understand that you are now in doubt as to whether the ship could have gone to Australia without going into drydock for repairs?

A. Yes.

Q. You are now in doubt, although you stated positively in answer to one of the interrogatories that she need not have delayed that trip on account of her condition?

A. I didn't answer your [198] question properly, your first question. Will you please have that first question given to me again?

Mr. McCUTCHEN.—Read it, Mr. Reporter.

(Testimony of G. H. Carter.)

(The record was here read by the reporter.)

A. (Continuing.) I will correct my answer to "No."

Q. You are not in doubt about it? A. No.

Q. Then is it your present position that she could have gone without undergoing repairs?

A. Without again going over the actual repairs, what they consisted of, with our engineer, I could not answer that question. It is possible that when she was put on the dock the repairs were found which would have made that voyage impossible, but if that is the case it never has been brought to my attention.

Q. Who ordered her into drydock? A. I did.

Q. Pursuant to what?

A. That I cannot remember.

Q. Had not Mr. Blackett, Lloyd's surveyor, told you she would have to go into drydock for repairs, or he would not give you a certificate which would permit her to proceed on her outward voyage?

A. Possibly, but I don't remember it. It is my opinion, however, my recollection, that we ordered her repairs here after the point of her making repairs in Australia was lost.

Q. Mr. Blackett's report of survey, which is attached to and made part of your answers to interrogatories, says:

> "It appears that after the vessel left Hongkong on her return to San Francisco a leak developed in the forepeak, and recommendations were made by the undersigned for the vessel to

(Testimony of G. H. Carter.)

Q. Do you remember that he made that recommendation?

A. No, but it sounds very reasonable, because she was docked. A recommendation might have been made, however, and not followed, without [199] voiding a certificate of seaworthiness.

Q. Suppose the vessel were lost afterwards, and you had not followed the recommendation, what would have been the effect on the insurance?

A. I should say that the seaworthy certificate would be sufficient to cover.

Q. But you had no seaworthy certificate?

A. She would have to have one, otherwise she would not be permitted to sail.

Q. From whom would she have to get it?

A. If it were Lloyd's, I think she would have to get it from Lloyd's agent.

Q. In other words, the issuance of that certificate was prerequisite to her leaving port?

A. It was essential to her clearance.

Q. In the ordinary course of business, what would become of the survey reports issued to the vessel, or to the captain, in Hongkong?

A. They would be in the steamer files, in our steamer files.

Q. How would they get there?

A. They would be mailed here, or possibly brought by the captain.

Q. Are they in your steamer files?

A. I do not know.

Q. Well, if they were brought by the captain.

A. They would be.

(Testimony of G. H. Carter.)

Q. Would he probably deliver them immediately upon arrival? A. He would deliver them.

Q. Immediately upon arrival?

A. He would deliver them at some time on arrival.

Q. Do you mean to say, Mr. Carter, that a captain of a ship to whom a survey of that kind was delivered, would not in turn deliver it to his owners immediately upon arrival?

A. Yes, probably with his other papers.

Q. Immediately on arrival? A. On arrival.

Q. Did not the captain of this ship deliver that survey report [200] to your office immediately upon arrival here on the 27th of June?

A. That I do not know.

The COURT.—We will take this matter up again at two o'clock.

(A recess was here taken until two o'clock P. M.) [201]

AFTERNOON SESSION.

Mr. GRIFFITHS.—If your Honor please, Mr. Blackett, from Lloyd's, is here; he has to leave for Honolulu to-morrow morning; with the consent of counsel we would like to put him on the stand now, out of order.

The COURT.—Very well.

Testimony of Joseph Blackett, for Respondent.

JOSEPH BLACKETT, called for the respondent, out of order, sworn.

Mr. GRIFFITHS.—Q. Mr. Blackett, you are

(Testimony of Joseph Blackett.)

the surveyor for Lloyd's Register of Shipping here in San Francisco? A. Yes.

Q. And have been for some time?

A. For seven years.

Q. Do you know the steamship "Cacicue"?

A. I do.

Q. Is she classed in Lloyd's?

A. Yes, she is classed in Lloyd's Register.

Q. Was she so classed in the summer of 1916?

A. She was.

Q. Was she called to your attention after her arrival here from the Orient on June 27, 1916? I do not mean was she called to your attention on the 27th, but was she called to your attention after her arrival here on that date?

A. Yes, between that and the date of the survey, which was held, I think, on the 10th of July.

Q. Where was the survey held?

A. At Hunter's Point Drydock.

Q. How did she happen to go, if you know, to Hunter's Point Drydock, why was she sent there?

A. I recommended her there for examination on account of a leak in the forepeak, stated to be due to heavy weather on the voyage from the far east to San Francisco.

Q. Were any survey reports, as made at Vladivostok and at Hongkong, [202] called to your attention in that connection? A. Yes.

Q. After she went on to the drydock at Hunter's Point, what conditions did you find? Have you got your survey report?

(Testimony of Joseph Blackett.)

A. I have my notes of that date. I find that one plate on each side of the stem in the sixth strake below the main sheer strake cracked, in each case about 20 inches.

Q. What part of the vessel is that?

A. That is immediately next to the stem bar, the forward end. And also the riveting to all frame brackets to the tank top in No. 2 hold started. A large number of rivets in the deep tank center line bulkhead.

Q. What about those rivets?

A. These were started, started to slack.

Q. Those are your notes for the 10th?

A. Yes.

Q. After the repairs were made, did you make a report? A. Yes.

Q. And is this a copy of the report I show you, dated August 2d, which is attached to the answers to the interrogatories?

A. Yes, that is a copy of the report.

Q. Refreshing your recollection by reference to that, can you tell us exactly what the conditions were which you found it necessary to repair?

A. It was necessary to repair the plates, the cracked plates, on this sixth strake below the sheer strake, and to renew the riveting of the gusset plates in the No. 2 double bottom, which is recommended here, and the riveting of the center line bulkhead to be cut out and renewed.

Q. Those were the conditions which you already stated you found in your notes of the 10th.

(Testimony of Joseph Blackett.)

A. Yes.

Q. Did you ultimately find further conditions needing attention, as indicated by that survey report?

A. There is the note of the guard ring of the stern bushing that was broken. [203]

Q. Will you kindly explain to the Court what the guard ring is of the stern bushing?

A. The stern bearing of the propeller shaft, it is a wood bearing, in length about four times the diameter of the shaft. This wood is fitted into a brass bushing, and to prevent the wood from backing out under running conditions, a guard plate is put over the ends—to prevent the strips of wood from backing out.

Q. What is the character of that wood?

A. That is *lignum vitae;* it is a hard wood that stands up to hard wear, and has lubricating qualities.

Q. And inside this wood the propeller shaft revolves? A. Yes, it revolves in the bearing.

Q. And that is what you call the bushing?

A. Yes, the stern bushing.

Q. What were the conditions as to the bushing, as indicated by the report?

A. The bushing showed it was bady hammered, and that pieces were broken out of the ends of some of the strips of wood.

Q. Referring to your statement there regarding the loosening of the riveting and caulking on the

(Testimony of Joseph Blackett.)

gusset plates of the No. 2 deep tank, how did that first come to your attention?

A. By the previous report made by the surveyor in the far east.

Q. At Hongkong? A. At Hongkong.

Q. And what was the character of that report, if you can state?

A. It stated that the tank was leaking through this riveting.

Q. And under what condition was she allowed to come here?

A. She was allowed to proceed then, provided they did not put any water or oil into this double bottom tank.

Q. Referring now, to the cracks in the sixth strake below the [204] sheer strake, the cracks in the plating, I will ask you whether you would pass that vessel as seaworthy to go on a voyage to Australia without the repairs being made? A. No.

Referring to the loosening of the riveting and caulking in the gusset plates on the No. 2 deep tank, I will ask you whether you would pass her as seaworthy to go to sea, to Australia, without being repaired? A. No.

Q. And what can you say as to the conditions in respect to the bushing, as regards to seaworthiness?

A. That would have to be repaired before going out; she would not be seaworthy unless that was repaired.

Mr. GRIFFITHS.—That is all.

(Testimony of Joseph Blackett.)

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Blackett, did you consider the defects in that vessel serious defects?

A. Yes.

Q. When did you find out these defects, after the vessel was in drydock, or before?

A. After the vessel was in drydock.

Q. You stated, did you not, that you did not think the vessel, in her condition, could have safely gone on the voyage to the Australian ports and made her repairs there?

A. She certainly could not, in my opinion.

Redirect Examination.

Mr. GRIFFITHS.—Q. You stated you found those defects after she went to drydock; does that apply to the leak in the forepeak?

A. The actual damage to the plating was found after the drydocking, but the leak in the forepeak, that was stated to me after the vessel arrived, between the 27th of June and the 10th of July, and that was the reason for recommending the vessel on to the drydock, on account of this leak in the forepeak. [205]

Testimony of G. H. Carter, for Libelant (Cross-examination Resumed).

G. H. CARTER, cross-examination (resumed).

Mr. McCUTCHEN.—Q. Have you made any inquiry, since you were on the stand this morning, to ascertain whether there is, among your files, a copy of this survey made in Hongkong, and to which Captain Blackett has just referred?

(Testimony of G. H. Carter.)

A. I think I saw a copy of it right here with Mr. Hengstler; I think we have one right here.

Q. Can you tell us when that became part of the archives of your office?

A. No, but I have no doubt that it was handed in with other papers by the captain on his arrival. It is an important document, and I think he would have turned it in with his other papers.

Q. You would think it safe to say, then, would you, that you had that in your possession before noon on the 27th of June?

A. Yes, I think it was in the office before noon.

Q. Is it not possible, Mr. Carter, for you to give us accurate information as to the time when the unloading of that vessel was concluded?

Mr. HENGSTLER.—I think our answers to your interrogatories show that.

A. When she completed unloading, yes, I think we should surely have the time.

Mr. McCUTCHEN.—Q. Can you tell us what she unloaded from day to day?

A. I believe no exact record at all was kept of her daily discharge.

Q. Does not that seem to you to be quite remarkable, Mr. Carter, that none of your departments kept any record of the tonnage discharged from that ship from day to day?

A. No; it would only be a rough estimate. They were working as fast as possible, with very poor men, on a very congested dock, during this strike. [206] I think it would have been more than un-

(Testimony of G. H. Carter.)

likely to have any records which would amount to anything.

Q. That condition continued, did it not, from the time you began until you got through, that is, you were working as fast as possible with the poor tools with which you had to work?

A. Yes, up to a certain extent we were. We did not work, as I remember it, 24 hours a day; we did not work right through the night; we abandoned that; we had expected to do that at first; at the same time, we did considerable night work.

Q. Was not that because you considered it unsafe to endeavor to work at night with the crews that you had?

A. No, but because it did not seem worth while.

Q. Had there been a good deal of violence on that wharf prior to the time that the "Cacicue" arrived?

A. No, I think not.

Q. You say it is your impression that there had not been a good deal of violence down there?

A. I have no recollection of any unusual violence. Of course, during a strike there is always more or less violence on the waterfront; but any unusual trouble on that dock, I don't remember any, either before or after it.

Q. You say there was a great congestion of freight: What was that due to?

A. The congestion of freight on the dock would be the congestion caused by the hurried unloading of this vessel.

Q. You know that the unloading of the vessel,

(Testimony of G. H. Carter.)

then, did result in a great congestion of freight on that dock?

A. Yes, a congestion. The dock was undeniably congested.

Q. And there was comparatively little room there on which or in which to deposit incoming freight, was there not?

A. Well, there was ample room. We were keeping ample room for that freight.

Q. For what length of time?

A. We were keeping room for this [207] incoming freight as long as we knew we were to get it.

Q. Did you go down there yourself?

A. No, I didn't go there at all.

Q. Then, how do you know you were keeping room for it?

A. I only know it from reports from our dock men and our steamship men.

Q. Your testimony, then, is based entirely on what somebody else told you, and is not founded on your own knowledge? A. Absolutely.

Q. Is that the case with any of the rest of your testimony?

A. Only with regard to the condition of the dock and what actually transpired on the dock.

Q. What was the quantity of that incoming cargo, in tons?

A. Between 7,000 and 8,000 tons, if my memory is correct. She had a full cargo.

(Testimony of G. H. Carter.)

Q. Would it be correct to say that she had 7,900 tons on board?

A. I should think so; that would be just about her full cargo.

Q. Did I understand you to say this morning that the leak in the forepeak tank did not do any injury or would not do any injury to the cargo?

A. Not necessarily. The forepeak bulkhead should stop any damage from a leak in the forepeak tank. Frequently a vessel will have a leak in the forepeak tank without repairing, except at some stated time, when they are making important repairs.

Q. You said this morning it would not do any damage at all.

A. It would not do any damage, provided the forepeak bulkhead is tight. Of course, any water will do damage if it can get through a ship.

Q. Was the forepeak bulkhead of this ship tight?

A. As far as I know, it was; in fact, I think—

[208]

Q. You say that these surveys or survey reports from Hongkong reached your office before 12 o'clock on the 27th of June; you must have known, then, at that time, that in the condition in which the double bottom tank was, she could not be used to store oil for fuel on the outward voyage?

A. In that tank?

Q. Yes, in that tank.

A. Yes, in that tank she could not, but she did not need that tank for oil on the outward voyage.

(Testimony of G. H. Carter.)

Q. What was her oil capacity other than that tank?

A. I don't remember exactly, but I should say that she had at least 50 per cent more capacity than necessary to take her to Australia, leaving that tank out.

Q. Can you tell us what that was? Instead of giving it in percentages, what was her capacity?

A. I think her total capacity must have been something over 2,000 tons, about 14,000 barrels. If my memory is correct, I should say that her total capacity would be about 2,000 tons of fuel oil, about 14,000 barrels. She burned, at the most, 200 barrels a day; 6,000 barrels should take her, approximately 6,000 to 7,000 barrels would take her to Australia. So her oil capacity was far greater than the voyage necessitated.

Q. Could she get the oil in Australia at that time?

A. I think so.

Q. Do you know that?

A. I don't know it now, but she had plenty of oil to move where she could get oil; in other words, we had anticipated sending her to Australia without repairing that tank, therefore we had figured that the oil was sufficient. On a lot of these details I am a little rusty, because years have passed since then.

Q. If Lloyd's surveyor required that tank to be repaired, in order that the ship could maintain her class, or classification, [209] you would have had those repairs made before the ship left here?

(Testimony of G. H. Carter.)

A. Yes, we would have had to.

Mr. McCUTCHEN.—I think that is all.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Carter, with reference to the packages of automobiles that had been deposited on your wharf by the Southern Pacific Company, you stated this morning that you had received notice by the Southern Pacific Company of their having been stopped by the Ford Motor Co. of Canada, and that you were notified that they must not be delivered to your company, were you not?

A. Yes.

Mr. McCUTCHEN.—One moment: I think that is a rather peculiar way to get into the record the contents of a written notification. I think Doctor Hengstler's question, without any offense to him, is incorrectly stated.

Mr. HENGSTLER.—I will be very glad to put the written communication itself, that followed, in afterwards, but Mr. Carter testified this morning that he was notified that his delivery was stopped by the Ford Motor Co.

Mr. McCUTCHEN.—How do you say he was notified?

Mr. HENGSTLER.—Q. How were you notified in the first place? A. We were first advised—

Mr. McCUTCHEN.—Will your Honor permit me a moment? Do I understand this was a conversation with Mr. Carter?

(Testimony of G. H. Carter.)

The COURT.—The witness testified this morning that they had phoned two or three times, and they were finally sent a letter enclosing a copy of a communication from the Ford Company; that letter was not in the file here, and he was to ascertain and report this afternoon, if he could, the exact date and hour of the receipt in his office—it was dated the 22d, I think. [210]

A. It is dated the 26th.

Mr. HENGSTLER.—The 22d.

A. No, the letter from the Southern Pacific is dated the 27th, I think.

Mr. HENGSTLER.—It is dated the 27th. It contained the notice.

Mr. McCUTCHEN.—I want to know whether this witness got that letter. That isn't even an original of the letter, is it, that you have here?

Mr. HENGSTLER.—No, it is not,

Mr. McCUTCHEN.—I think we are entitled to know whether this witness got the letter, and what he knows about it personally.

Mr. HENGSTLER.—I am asking him when he first received notice from the Southern Pacific Company, and in what form he received the notice, that these automobiles would not be delivered by the Southern Pacific Company to the ship.

Mr. McCUTCHEN.—I think there is another objection to that, and that is that the libel does not declare on that. The libel declares on an anticipatory breach set forth in two communications, one on the 26th of June, and the other on the 24th of

June, both of them, it is said—no, one on the 14th of June and the other on the 24th of June, those two communications having been received, one on the 24th or 23d, and the other on the 24th or 26th; at any rate, the receipt of both of those preceded the demand of the 26th for the delivery of the freight.

The COURT.—You must remember that you asked him for anything intervening between the receipt of those letters and the filing of the libel bearing upon this question. He turned to his files and he said that the libel was filed on the 27th, and produced a letter from the railroad company dated the 27th, and it was to ascertain, if he could, at what time that letter reached his office. [211]

Mr. McCUTCHEN.—I think the question I asked him was whether the Ford Company made any communication to him between those dates—whether he received it from the Ford Company.

The COURT.—I believe that is true, as to whether he had, in fact, come in contact with the Ford people, was the form of the question.

Mr. McCUTCHEN.—Yes.

The COURT.—But to my mind—I don't know whether I was wrong or not—that it had a bearing on the question as to whether they were trying to keep the contract alive for one purpose and kill it for another, and I wanted to find out all the facts in the matter.

Mr. HENGSTLER.—That is why the question was asked.

The COURT.—I rather thought that was the purpose of your question. I did not like to have it left in the air.

Mr. HENGSTLER.—That was evidently the object of asking Mr. Carter the question about the 1,100 packages this morning.

Mr. McCUTCHEN.—As a further suggestion, I might say the witness said some time ago that he was testifying to information here that he got from somebody else, and I would like to have him cautioned before answering this question to confine himself to communications that he, himself, had with the Southern Pacific Company.

The COURT.—I suppose that qualification is fundamental.

Mr. McCUTCHEN.—Of course, we are not bound by what the Southern Pacific Company said, but I think that the witness should confine himself to what the Southern Pacific said to him, if conversations between him and the Southern Pacific are to be admitted against us.

The COURT.—I don't know why we are stirring up the trouble [212] at this late date. It is clear to me. If he had received a number of telephone communications that the Ford people did not want any more of this delivered, and that later was confirmed by these letters, why we want to go over that ground again and stir up this trouble among ourselves and outsiders, I cannot quite see. The only thing that was left was to find out the exact

date that letter was received in the office, and this is not throwing any light on that.

Mr. HENGSTLER.—If your Honor is clear on the point—

The COURT.—I am quite clear on it.

Mr. HENGSTLER.—That the Ford Motor Co. exercised this—

The COURT.—The question arose. I am not saying as a legal proposition what they exercised, but I am saying that the testimony was quite clear up to the present. This freight was lying on the dock ready for loading, and the witness says that the freight had been delivered through the mistake of the Southern Pacific.

Mr. HENGSTLER.—The witness, I think, inadvertently, in answer to one of the questions, stated that this cargo was received as freight for the "Cacicue," and that might be misunderstood, and undoubtedly will be used by the other side, and for that reason I wanted to clear up that matter, in what way the cargo had been received; in other words, I want to show—

The COURT.—It had been received to the extent that you filed a libel to foreclose a lien on it.

Mr. McCUTCHEN.—I do not think it is exactly proper that counsel should suggest the witness inadvertently stated that. The witness was very positive and unequivocal, and it is in line with the sworn statement in the libel. [213]

The COURT.—The libel counts on that matter and undertakes to foreclose a lien on it for the

(Testimony of G. H. Carter.)

freight, which probably it could not do if it had not been delivered, I don't suppose. I still revert to my original proposition that the only thing that was left on this question was that he get that letter. The fact itself, is in evidence now, and they put it in such a shape that it can be stricken out.

Mr. HENGSTLER.—Will your Honor permit me to ask this question: When were you first notified of the fact that the goods were stopped and must not be delivered to you?

Mr. McCUTCHEN.—I object to that unless—

Mr. HENGSTLER.—Q. (Continuing.) By letter, or verbally, or in any form.

Mr. McCUTCHEN.—That assumes a fact not proven, as suggested to him, and beyond that I think the witness should be asked the name of the person with whom he had such conversation.

The COURT.—Yes, if he had any conversation.

Mr. HENGSTLER.—Q. Mr. Carter, did you have any conversation— A. (Intg.) None.

Q. (Continuing.) —with anybody acting on behalf of the Southern Pacific Company, Mr. Hardy or anybody else acting for the Southern Pacific Company, in which you were notified that the automobiles which were on your wharf had been delivered inadvertently by the Southern Pacific Company, and that you must not consider them as freight for the "Cacicue," and that the Southern Pacific Company could not deliver them to you?

Mr. McCUTCHEN.—I suggest that is leading and suggestive.

The COURT.—Yes.

Mr. McCUTCHEN.—And beyond that, we are not bound by a conversation between this witness and the Southern Pacific [214] Company.

The COURT.—That throws a new element into it. It appears now for the first time that you must not consider it as the freight for the "Cacicue." That is the first time I heard of that.

Mr. HENGSTLER.—I think that is exactly the point. This is in the letter written—

Mr. McCUTCHEN.—What letter?

Mr. HENGSTLER.—In evidence now, dated June 24, 1916, by L. C. Davis, to W. R. Grace & Co., and in that letter W. R. Grace & Co., are notified by Davis that unless the 4,075 tons is taken on the understanding which is set forth in that letter and not subject to freight for 6,000—unless it is taken not subject to freight, they request that we withhold the loading of any of this cargo. In other words, on the 24th, Davis notified Mr. Carter, as it is in evidence, to withhold the loading of any of this cargo, which was on the wharf, which had been delivered by the Southern Pacific Company on the wharf; that is the condition in which that cargo was. In addition to that, I desire to show that Mr. Carter was informed by the officials of the Southern Pacific Company about that time—I want to get the date from him—that the Southern Pacific Company had been instructed by the Ford Motor Co. of Canada not to deliver any cargo to the "Cacicue."

The COURT.—You are coming back to the ori-

(Testimony of G. H. Carter.)

ginal proposition, now. Your question went a furlong further, to the extent that the cargo already on the dock could not be regarded as freight. That may be true, I don't know, but the form of the question is so distinctly leading that it ought to be reframed. Might I ask the witness a question? [215]

Q. Did you have any communication directly with the Southern Pacific Company concerning this?

A. None.

Mr. McCUTCHEN.—I move that all of the witness' testimony on that subject be stricken out.

The COURT.—Let it go out.

Mr. HENGSTLER.—I don't know whether Mr. Carter understands the situation or not. You told me during the noon recess that you did have conversations with officials of the Southern Pacific Company, did you not?

A. No, not personally. They were reported to me from our traffic department.

Q. Who reported them to you?

A. Mr. Moore.

Mr. HENGSTLER.—I will recall Mr. Moore, then.

The COURT.—I just felt that we would run this thing along until it would be stricken out.

Mr. HENGSTLER.—I understood that the witness would be notified by officials of the Southern Pacific Company personally. At this point, if your Honor please, I desire to state that I received a communication from the Southern Pacific Company,

signed by Mr. William F. Herrin, on June 27, 1916, and that I have lost the original letter. I mentioned the matter to Mr. Williamson, yesterday, and he had no objection to my introducing in evidence a copy of the letter which was received from the Southern Pacific Company, and which contained a copy of the letter written by the Ford Motor Company, signed by Mr. L. C. Davis, June 26, 1916.

Mr. McCUTCHEN.—May we see that?

Mr. HENGSTLER.—Yes.

Mr. WILLIAMSON.—Is that the copy I gave you?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—Did this come through the mail? [216]

Mr. HENGSTLER.—This came through the mail.

Mr. McCUTCHEN.—Then it may very well be you did not get it on the 27th.

Mr. HENGSTLER.—No, I received it on the 27th.

Mr. McCUTCHEN.—What time on the 27th?

Mr. HENGSTLER.—I received it in the forenoon on the 27th. It contains this notice of June 26th. My recollection is that I received it before the libel was filed, whether it was noon or just what hour it was I could not state now.

Mr. McCUTCHEN.—Where is the original letter? I am not questioning your statement, but—

Mr. HENGSTLER.—The original letter is lost in my office. I had that original letter up to a short time ago, but it has been mislaid; it has been filed

probably in the wrong file, and Mr. Williamson has a copy of this letter, and the enclosure.

Mr. McCUTCHEN.—I understand that; that is not the point. Mr. Williamson furnished you with that letter. There is no question about that. But I must say I have some doubt—I do not question the truthfulness of your statement, if you have any distinct memory of it; a letter written on the 27th and placed in the mail would not have reached you the forenoon of the 27th.

Mr. HENGSTLER.—Of course, I don't know whether it was written on the 27th,—if it was placed in the mails at that time—events happened very rapidly. I have been in communication with Mr. Herrin and Mr. Durbrow over the phone, and W. R. Grace have been in communication with other offices of the Southern Pacific Company, and these matters were sent with very little delay.

Mr. McCUTCHEN.—I take it that what counsel really wants is this letter from Mr. Davis, enclosed in the letter from Mr. [217] Herrin. I do not think that we are bound by any statement that Mr. Herrin made, and we do not make any objection to the use by him of the Davis letter.

Mr. HENGSTLER.—My main object is to have the Davis letter in evidence.

Mr. McCUTCHEN.—I am not willing to admit, however, that that Davis letter came into their possession before the filing of the libel, and, indeed, it is not one of the communications, one of the two

communications that the libel alleges contains anticipatory breaches of this contract.

Mr. HENGSTLER.—There is no objection, then, to introducing in evidence the Davis letter?

Mr. McCUTCHEN.—What is the purpose of that, I would like to ask?

Mr. HENGSTLER.—The purpose of that letter is to show that as a matter of fact from and after June 22d the Ford Motor Company of Canada had stopped this cargo in transit, and had given notice to the Southern Pacific Company that they must not deliver this cargo of the "Cacicue."

Mr. McCUTCHEN.—At present. The "Cacicue" was not ready to receive cargo.

Mr. HENGSTLER.—Whatever the notice says. This is the notice which was contained in a letter which I received on June 27, and the stoppage went right up to the time of the libel.

Mr. McCUTCHEN.—We make objection, if your Honor pleose, that this letter has not anything to do with the transaction for the reason that in the first place it is not an instruction to the Southern Pacific to stop the delivery except at present. There is no suggestion that it interfered with the ability of the "Cacicue" to load, and it is not one of the [218] two documents or papers which are relied upon in this libel as containing the anticipatory breach.

The COURT.—The objection will be overruled.

Mr. HENGSTLER.—The letter is on the letter-

(Testimony of G. H. Carter.)

head of the Ford Motor Co., Automobile Manufacturers, San Francisco, June 22, 1916.

"Mr. W. J. Hardy,
"Southern Pacific Co.,
"Fourth & Berry Streets,
"San Francisco, Cal.

"Dear Sir:

"Attention Mr. Frank Renz, Steamer Clerk.

"All statements or agreements contained in this letter are contingent on strikes, accidents, fires, or any other causes beyond our control, and all contracts are subject to approval by the signature of the duly authorized executive officer of this company. Clerical errors subject to correction."

The body of the letter is:

"Confirming our telephone conversation of recent date:

"Until you are authorized to do so, please do not, under any circumstances, deliver any of the cargo at present on hand booked steamer 'Cacicue' to W. R. Grace & Co.

"FORD MOTOR CO.
"Traffic Department,
"L. C. DAVIS."

Q. Now, Mr. Carter, were you notified of the contents of this letter thereafter?

Mr. McCUTCHEN.—I object to that as calling for hearsay.

The COURT.—What was the question?

Mr. McCUTCHEN.—He asked if he was notified of the contents of this letter thereafter.

(Testimony of G. H. Carter.)

Mr. HENGSTLER.—Q. In the regular course of business, of this "Cacicue" transaction?

The COURT.—I do not quite see the bearing of the question. [219]

Mr. HENGSTLER.—I will call Mr. Moore again to show that W. R. Grace & Co. were aware from that time on that this cargo could not be delivered to them, and was not in their possession.

The COURT.—From what time on?

Mr. HENGSTLER.—From June 22d; that it remained in the possession of the Ford Motor Co.; although it was on the wharf, delivered by mistake upon the wharf of the "Cacicue." I think the point is important in view of the position that the other side has taken in this matter.

Now, if your Honor please, I called for the production of communications between the San Francisco office of the Ford Motor Company and the Ontario office of the Ford Motor Company with reference to this shipment of automobiles on the "Cacicue" prior to the time when the contract was entered into, and if I understand Mr. Williamson correctly, he has stated to the Court—I am not certain whether my understanding is correct—that he has no such communications.

Mr. WILLIAMSON.—I have none. I laid before you yesterday afternoon all correspondence of every kind between February 24, which was the first that I had, and the time of the filing of the libel.

Mr. HENGSTLER.—You stated that the balance of these letters had been destroyed.

Mr. WILLIAMSON.—I stated that my inquiry at San Francisco at the American Ford Company's office disclosed the fact that they, having no interest in this suit, destroyed their files two years ago, and that whatever there might still be in Ford, Ontario, of course, I would get.

Mr. HENGSTLER.—I have had an opportunity to examine one of two files that I asked my opponent to produce, and went over one [220] yesterday with Mr. Williamson. The other file I have not so far had an opportunity, on account of lack of time, to examine. I would like to have an opportunity to examine the other file. Have you the file here, Mr. Williamson, that we examined yesterday?

Mr. WILLIAMSON.—Yes.

Mr. HENGSTLER.—I desire to put a number of letters and telegrams that passed between the Ford Motor Co. of Canada and the Ford Motor Co. of San Francisco in evidence, because they have a bearing upon the main issues in this case. The first letter that I ask for is the letter of February 25, from Ontario to San Francisco.

Mr. WILLIAMSON.—A telegram.

Mr. HENGSTLER.—I introduce in evidence a telegram—

Mr. WILLIAMSON.—Doctor, are you going to read these as you introduce them?

Mr. HENGSTLER.—I think it would be better, for the Court to get a correct idea of the main points of this transaction, if I read these letters now.

The first telegram is a telegram from the Ford Motor Co. of San Francisco to the Ford Motor Co. of Canada, Ford, Ontario, Canada, dated San Francisco, Cal., February 24, 1916, reading as follows—will you permit me only to read that part here?

Mr. WILLIAMSON.—I was going to suggest there is only one small portion, and that you read that.

Mr. HENGSTLER.—I will read only the portion which refers to this shipment:

"If you can take 6200 tons for early June can close with Grace Co. same rate Wellington and Sydney or Wellington and Melbourne. Must know Friday." [221]

The telegram from the Ford Motor Co. of Canada reads as follows:

"Ford, Ontario, February 25, 1916.

"Ford Motor Co., San Francisco.

"Accept Grace offer 6200 tons, confirm advising names and dates of sailing.

"FORD MOTOR CO. OF CANADA, LTD."

I next offer in evidence a night letter, reading as follows:

"San Francisco, Cal., Feb. 27, 1916.

"Ford Motor Co. of Canada, Ltd.

"Ford, Ontario, Canada.

"Have signed with Grace American Steamer 'Cacicue' about June 24th. Union advise Illinois Central made them firm offer your account six thousand tons at fifty-two fifty."

Is it admitted, Mr. Williamson, that "Union" means Union Steamship Company?

Mr. WILLIAMSON.—That is admitted.

Mr. HENGSTLER.—This continues: "They prefer doing business direct in order play fair with terminal line agents. If you haven't closed wire us authority, think can close at forty-seven fifty. Union will take all small shipments on Kurow from here March twenty-third, rate thirty dollars. How much of Illinois Central four thousand ton booking can you give Union for steamer March 29th sailing. Answer this wire immediately. Confidential. Ford Motor Co."

Mr. WILLIAMSON.—I am going to make a suggestion to you, Doctor, that I think will save time. Where the communication is from the Ford Motor Co. of Canada, Limited, you can simply say, "From Respondent"; and when it is from the Ford Motor Co. of San Francisco, where that is mentioned, you can simply say "Ford Co., San Francisco." It will save reading all those [222] long names.

Mr. HENGSTLER.—I shall be very glad to do so.

The next is a letter from respondent to Ford Motor Co., San Francisco, dated February 28, 1916:

"We received your night letter of the 27th.

"You state you have signed with the Grace American steamship 'Cacicue' sailing about June 24th.

"You do not state the number of tons or the port. Please let us have this information by wire imme-

diately upon receipt of this letter, if it has not already been forwarded at that time. Please also state the rate.

"Yours very truly,

"PRITCHARD."

The next is a night lettergram from respondent to Ford Motor Co., San Francisco:

"Your wire re steamer 'Cacicue' and eight thousand tons. We need about four thousand tons in addition to ten thousand arranged to end July say for late June early July sailing. Arrange for this lowest rate and not exceeding $52.50. Complete specification by ports to end July to you, and complete letter instructions."

The next is dated March 1, Ford Motor Co. of San Francisco to Respondent:

"Confirming our wire of the 27th, we are enclosing herewith contract executed by W. R. Grace & Co. of this city for sixty-two hundred tons for Wellington and Sydney per their American Steamer 'Cacicue' for June loading at the rate of $47.50 per ton.

"You will note in our wire we advised you that Grace & Co. would take this tonnage to either Wellington and Sydney or Wellington and Melbourne, but not make the call at the three named ports, and you will note the contract reads Wellington and [223] Sydney. If possible, we think it would be advisable for you to endeavor to ship Sydney and Melbourne rather than Wellington, as we figure that we will be able to supply Wellington through the

Union Steamship Company by direct sailings.

"We would call your particular attention to the last paragraph of the contract in which the steamship company state shippers will be charged demurrage at the rate of $3,000 per day. However, we figure that with the sufficient time which will elapse between now and the sailing date, you will be able to have this shipment on hand. The boat is scheduled to sail about the 14th of June. If you desire to load out some of this shipment, the Grace Co. have advised us they will be able to store on their dock about fifteen or twenty carloads. Therefore, you should be well posted on the car situation, and be sure to have your equipment so that there will not be the slightest delay."

I have here, Mr. Williamson, a note of a telegram of March 1st.

Mr. WILLIAMSON.—You will remember that we found a couple in the other file, Doctor, a couple that were not here. What was the other telegram? I kept them just as they came to me.

Mr. HENGSTLER.—A wire from the Ford Co. of San Francisco.

Mr. WILLIAMSON.—I showed you that last night. Is this it?

Mr. HENGSTLER.—March 1, yes.

"Your wire steamer 'Cacicue' and eight thousand tons"—I think I read that.

Mr. WILLIAMSON.—Yes, you read that in the letter.

Mr. HENGSTLER.—Yes, that is right, I read that in the letter.

The COURT.—Let me see that; I don't know that I caught it just right. [224]

Mr. WILLIAMSON.—Yes, your Honor.

Mr. HENGSTLER.—What letter was that in, Mr. Williamson?

Mr. WILLIAMSON.—I think I heard you read it just a moment ago.

Mr. HENGSTLER.—I am confused about that, Mr. Williamson. I don't think I read it. In order that there shall be no question about it, I think that I had better read it again.

"Your wire re steamer 'Cacique' and eight thousand tons. We need about four thousand tons in addition to ten thousand arranged to end July say for late June early July sailing. Arrange for this lowest rate and not exceeding $52.50. Complete specification by ports to end July to you and complete letter instructions."

The next is a night lettergram from respondent to Ford Motor Co., San Francisco. It is dated March 2, 1916:

"Understand you have arranged sixty-two hundred tons, our understanding this is the only contract you have arranged, and this is all we will need to end of July; we have already signed contracts Illinois Central Railroad for four thousand and six thousand tons."

The next is March 3, 1916, respondent to Ford Motor Co., San Francisco.

"Please advise definitely what you are able to do. We have contracted for four thousand tons and six thousand tons Illinois Central. Understand you have engagement by steamer named 'Casique.' We are also informed you have engaged six thousand two hundred tons. We need only about six thousand tons in addition to what we arranged and would like this for June-July sailing; advise."

The next is March 3, Ford Motor Co., San Francisco, to respondent:

"Grace Steamer 'Casique' booking is sixty-two hundred tons, [225] rate forty-seven fifty, Port Wellington or Sydney or Wellington and Sydney. Cannot go to Melbourne. Contract mailed March first. Please reply our wire second regarding Union boat for first week in April for Sydney."

The next is March 4, Ford Motor Co., San Francisco, to respondent:

"Regarding exchange of wires on space secured by the Illinois Central and this office, this is how the situation lines up at the present time.

"We secured from the Union 3500 tons per steamers 'Kurow' and 'Waikawa,' rate $35.00. This freight is now moving. The Illinois Central from the Union 4,000 tons at $47.50 and another 6,000 at $52.50. We next secured from Grace & Company per their steamer 'Cacique' sailing from here about June 15th for Wellington and Sydney 6,200 at $47.50, or a total of 19,700 tons.

"Your wire of the 2d as follows:

" 'Advise immediately what you can do about six thousand tons.'

led us to believe you wanted still more space immediately, which we endeavored to secure from the Union. They have cabled their Australian office for another boat and should have a reply early next week.

"As advised you in one of our wires 'We are negotiating with the Union for eight thousand tons' which we felt sure you needed but from subsequent wires it would seem that you have all the space required up to June and July and will need no more until late July or early August.

"Please keep us well posted on contemplated shipments in plenty of time for us to secure space.

"We might advise that the Union Steamship Company are favorable to us, they having been in receipt of advice from their Home [226] Office in Australia which stated in part 'to take care of Ford' so this would indicate that although they have been offered higher rate than $52.50, we will be able to secure considerable space at that rate. We are recently informed that their latest quotation was $60.00. However, as above stated we seem to be the favored ones because we have always set the pace as to rates."

The balance of it is immaterial.

The next is March 28, 1916, respondent to Ford Motor Co., San Francisco:

"Have not heard from you with ports and quantities for 'Cacique.' You state sixty-two hundred tons. We will be able to give forty-two hundred eighty-four tons made up Adelaide seventy-two, Brisbane one hundred twenty, Fremantle seventy-two, Melbourne two hundred and four, Sydney two hundred and twenty-eight, Wellington three hundred twenty-four, plus any left overs from Union Steamship contracts. Do not reserve any more space until July."

There is a letter of March 30, Mr. Williams, from respondent to Ford Co. of San Francisco; that must be in your other file.

Mr. WILLIAMSON.—I guess that was the one we found in this file last night.

Mr. HENGSTLER.—Yes, you said it was in the other file.

Letter from respondent to Ford Motor Co., San Francisco, dated March 30, 1916, reading as follows:

"We refer to your wire of March 29, advising us to look at the 'Casique' contract to see ports, and arbitraries, etc. We have not yet received this contract. The arrangement in our recent letter, however, holds."

Letter of April 3, 1916, from Ford Motor Co. of San [227] Francisco to respondent, reading as follows:

"We have your letter of the 30th, in which you advise you had not received contract which we executed with Grace & Co. for 6200 tons per their steamer 'Casique' for June sailing, and to say that

we were surprised at your letter is expressing it mildly. We wrote you on March 1st as follows:

"'Confirming our wire of the 27th, we are enclosing herewith contract executed by W. R. Grace & Co. of this city for 6200 tons for Wellington and Sydney per their American steamer "Casique" for June loading at the rate of $47.50 per ton' "—

Mr. WILLIAMSON.—Doctor, you are reading again the letter you have already read in. It is the letter of March 1st. The first three paragraphs are a duplication.

Mr. HENGSTLER.—Then Mr. Davis quotes in this letter, in the second paragraph, beginning with the words, "You will note," and ending with the words "direct sailings," and in the next paragraph, beginning with the words, "We would call your particuar attention," and ending with the words, "slightest delay." Then the letter proceeds:

"You will note from this letter that the contract has been entirely arranged for, and as we wired you to-day we are compromised for 6200 tons and will be obliged to pay dead freight for any unshipped portion.

"At the time of enclosing the original contract with this letter, the importance of the transaction was very firmly impressed upon the writer and he is positively sure that this original contract was enclosed with the above letter. If this letter has not reached you there is something wrong with the mails and we have started an immediate investigation with a view of locating this letter. [228]

"We are enclosing herewith copy of the original contract dated February 25th which, with your authorization, was signed by the writer.

"We trust that nothing will stand in the way of your fulfilling same and supplying the steamer 'Cacique' with the tonnage as originally contracted for."

Letter from Ford Motor Co. of San Francisco, to respondent, dated April 3, 1916:

"In re: S. S. 'Cacique'

"We acknowledge receipt of yours of the 28th and with considerable surprise note that you will only have 4284 tons for the contract which we signed to cover 6200 tons. At the time of writing this letter, we have not taken this matter up with the W. R. Grace Company, but we feel that when it is taken up with them they will desire to cancel our contract entirely.

"We have written and wired you requesting from your office absolute assurance that the embargo, which is threatened by England, will have no effect on our shipments but as yet we have not received this assurance from you, excepting a wire in which you state that the embargo on England would not affect Australia and New Zealand unless those countries saw fit to make it apply, but this was not sufficient assurance for the W. R. Grace Company. As also advised, we are negotiating with them for about 2000 tons on their S. S. 'Cuzco' to take the cargo which was burned in St. Johns Harbor.

"We are anxious for something definite on this

and we should like very much to hear from you. We have been made offers by reliable concerns here for sailing vessels at a rate from $30.00 to $35.00 or perhaps $40.00 or steamer rate of $55.00 which we think is the best that can be done at this time.

"We wish you would go over these matters thoroughly and [229] advise just what can be done with regard to the 'Cacique' and also reply to our wire of the 29th regarding the 'Cuzco' which Grace & Company will probably send to Wellington and Sydney if you can give positive assurance that the embargo will not in any way affect the movement."

And then there is the following postcript:

"P. S.—In the above we have mentioned nothing regarding contract mailed to you in ours of March 1st. This contract was executed by W. R. Grace & Co., and covers 6200 tons space in their American Steamer 'Casique' for June loading, at $47.50 per ton to ports of call. We have never received an acknowledgment of this letter stating that you had received this contract."

Letter from respondent to Ford Motor Co. of San Francisco, dated April 4, 1916:

"S. S. 'Cacique'.

"We refer to your wire of April 3d reading—

> "Refer our letter March first enclosing contract with W. R. Grace their Steamer 'Cacique' we are definitely compromised for sixty-two hundred tons for this vessel otherwise dead freight will be payable on any unshipped quantity.'

"We are sorry that we did not know the existence of this contract. It has never been received at this office. Had we had it, we would not have made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of $35.00 per ton. We did not know that your booking with the Grace Company was firm for this whole amount, and took up the balance of the 6200 tons over and above 4284 tons of which we advised you we had present specifications for, by this New Zealand steamer.

"However, we expect certain additions from Australia, which [230] will no doubt bring our specifications up to the required amount.

"You might send us copy of the contract and copy of your letter enclosing same."

Letter from Ford Motor Company, San Francisco, to respondent, dated April 10, 1916:

"We have your letter of the 4th which is in reply to our wire of April 3d.

"We regret exceedingly this unfortunate circumstance and we are at a loss to understand where the contract with W. R. Grace covering 6200 tons for their steamer 'Cacique' could have gone to. Naturally, had same been wrongly addressed, it would have been returned to us and as the writer is quite careful in enclosing these contracts personally, we, of course, felt absolutely certain that same was forwarded to you in our letter of March 1st, copy of

which and also copy of contract have been mailed to you under recent date.

"Our correspondence prior to the mailing of the contract referred to 6200 tons and we had never at any time specified any smaller amount for this boat and we, of course, thought the matter was thoroughly understood by you."

I desire to call your Honor's attention to the fact that this letter refers to "our correspondence prior to the mailing of the contract referred to." That was the correspondence for which I called, and which seems to have been destroyed. Then the letter goes on:

"We hope that you will be able to supply the tonnage as W. R. Grace & Company have contract for more tonnage for this boat and as you know, it must go down there and return empty, and as they have arranged their schedule, you realize the importance of our fulfilling our contract. [231]

"If you think you will not be able to supply this cargo, kindly let us know immediately or as soon as practicable in order that we may take the necessary steps to secure tonnage at this end."

Mr. WILLIAMSON.—Doctor, I don't like to have that statement made by you go unchallenged in the record. I don't know that there ever was any prior correspondence. The telegram from Mr. Davis was: If you can use so much, 6200 tons, on this steamer, we can get it on Grace steamer "Cacicue." That telegram was produced. The next telegram from the Ford Company, the respondent,

was: We will accept, wire us dates of sailing. That telegram was produced. So far as I know, that is all there ever was prior to the making of the contract. I don't like to have the record show that apparently anything is missing. We do not know that there is.

Mr. HENGSTLER.—I don't know whether there is, or not. I simply called attention to the reference in the correspondence.

Mr. WILLIAMSON.—I think it is better understood in the record now that neither of us knows that there is anything else.

Mr. HENGSTLER.—The next is dated April 10, 1916, Ford Motor Co. of San Francisco, to respondent:

"We thank you for your letter of the 4th regarding the so-called embargo which we were in fear of being placed on automobile to Australia.

"Of course, at this time it is too late for W. R. Grace & Company to withdraw as they have signed up sufficient cargo in addition to our 6200 tons that at the present time it is impossible for them to withdraw their ship. However, your assurance relieves them of considerable anxiety and we are sure that everything will come out all right." [232]

Letter from respondent to Ford Motor Co., San Francisco, dated April 19, 1916, reading as follows:

"S. S. Cacique.

"We understand that we are supposed to have 6200 tons on this steamer. Actually we have cars for only 4572 tons. Due to the nonreceipt of the

contract and the uncertainty we were in concerning this steamer, as expressed in our telegrams and letters to you, we engaged space for certain cars by the S. S. 'Whakatane' and 'Paheka' of the New Zealand Shipping Company, which otherwise would have gone on the S. S. 'Cacique.'

"There will be about 1628 tons space which we will be unable to use. This is for your information and the information of the Grace Company, in order that they may fill up this space.

"This of course, is on the assumption that the Union Steamship Company are going to take the full number of cars which have been shipped for their 10,000 contract. These cars are now en route.

"If there is any disposition on the part of the Union Steamship Company to fall down on any boats, or you can gauge the amount by which they will fall down among the steamers for which they have space, you will please make immediate arrangements to transfer these to the steamer 'Cacique,' in fulfillment of this 1628 ton shortage.

"In the event of the Union Steamship Company having any left overs from the steamers which they specify, if you will advise us just the tonnage that will likely be left over, we can arrange to tell you what invoices to put aboard the 'Cacique.'

"Will you please give this matter your immediate attention?"

The next is dated May 4, 1916, letter from respondent, signed by Prichard, to the Ford Motor Co., San Francisco: [233]

"We are writing you concurrently showing the number of cars by ports and the date that these will leave the factory for the Grace Steamer Cacique. We find that the total tonnage we will have for this steamer will be 5,087 tons.

"We have advised you concurrently about an offer from Henry W. Peabody & Company, 17 State Street, New York City for 600 tons space by this steamer."

Letter dated May 4, 1916, from respondent to Ford Motor Co., San Francisco:

"We enclose confirmation of our wire which was the result of a wire from Henry W. Peabody & Company, 17 State Street, New York City, stating they would take 600 tons space on the steamer 'Cacipue.'

"We have told them to deal directly with Grace & Company.

"We have intimated to you that we cannot take the whole amount of the cargo on the 'Cacique' and will forward you by concurrent letter a complete layout of the space we will be able to absorb.

"There may be certain parts shipments in addition, concerning which we will advise you later."

Have you, Mr. Williamson, that concurrent letter referred to here, in which there is a complete lay-out of the space?

Mr. WILLIAMSON:—No. The original should be there and the copy should be here. There is a lay-out of space here, but I don't know whether this is it or not. Here is a copy of the letter of May 4th, but the specifications are not in here. I think

they probably will conform to these that appear a few days later; I don't know that, but I imagine that will be the case.

Mr. HENGSTLER.—The next is a letter dated May 5, 1916, [234] from respondent to Ford Motor Co., San Francisco, reading as follows:

"We are shipping to-day in Car CMStP. 78162 carload of parts for Australia and New Zealand.

"These parts are going forward to make connections with steamer 'Cacique.'"

The next is dated May 6, 1916, from respondent to Ford Motor Co., San Francisco, reading as follows:

"We have shipped two carloads of parts for the steamer 'Cacique' in addition to tonnage of which we have previously advised you. These two carloads of parts contain 38.20 tons, this in addition to the tonnage of which you were advised in our recent letter."

The next is dated May 11, letter from respondent to Ford Motor Co., San Francisco, reading as follows:

"We would be glad if you would let us know exactly how we stand with respect to the tonnage on this boat at the present time, after taking into consideration the moving forward of all cars of which you have been advised, as contemplated by this steamer, together with parts tonnage of which you have been advised separately.

"The Sales Department is sending you a complete memorandum as to this tonnage, together with the

date of shipment of all these cars from the factory."

I would like to get that memorandum, if you have it, Mr. Williamson.

Mr. WILLIAMSON.—I have not, Doctor, unless it is this one without a date. That shows the number of boxes, the number of cubic feet, and the ports. It refers to the May 5th shipment which you referred to a few minutes ago, and the May 6th shipment. [235]

Mr. HENGSTLER.—Does it contain the dates of shipment of the cars?

Mr. WILLIAMSON.—Certain shipments for May 5 and certain shipments for May 6th.

Mr. HENGSTLER.—Only those two? It is not a complete memorandum.

Mr. WILLIAMSON.—No. That is all I have in this file. Just a moment, Doctor; on the other side of the paper I notice there are some shipments. You can look at this.

Mr. HENGSTLER.—That could not be a complete memorandum.

The next is May 11, 1916, letter from respondent to Ford Motor Co., San Francisco, reading as follows:

"We are enclosing herewith our May schedule showing the number of cars which will be shipped from the factory each day for the steamer 'Cacique.' This will amount to 1288 cars.

"We advised you some time ago that we would have 1316 cars for the 'Cacique,' but we find it im-

possible to ship this number on account of new method of crating."

This last letter mentions a new difficulty encountered by the respondent in making the delivery of the cars.

The next is May 12, 1916, letter from Ford Motor Company, San Francisco, to respondent, reading as follows:

"Please refer to your letter of April 19th and subsequent letters and telegrams regarding tonnage for Grace & Company's S. S. 'Cacique.' In your letter of the 19th you advised you will be 1628 tons short.

"On May 1st we received your wire in which you advised there were 1316 cars in all and based on the measurement of approximately 4.3 tons each would make a total of 5658 tons. This leaves only a difference of 542 tons for which we have signed contract with Henry W. Peabody & Company. [236]

"Then in your telegram of the 8th you advised that complete tonnage for 'Cacique' was 5087 and 4 carloads of extra parts, which carloads of parts we understand measure approximately 32 tons each or 128 tons, which makes a total of 5215 tons. Therefore, we are still shy a cargo for this ship.

"We, therefore, request that you advise us as soon as possible just what tonnage you will use, also amount of tonnage to be shipped to Wellington and Sydney. This, of course, includes all transshipments, so that Grace & Company will be able to tell just about how much freight will be left at Sydney and how much at Wellington in order to enable

them to properly stow other cargo."

The next is a letter dated May 12, 1916, from Ford Motor Company, San Francisco, to respondent, reading as follows:

"We are enclosing herewith contract, which we have signed with Henry W. Peabody & Company covering 542 tons space on Grace & Company's steamer 'Cacique,' which space you will not be able to fill and for which we are charged by Grace & Company. You will note we have succeeded in securing a rate of $47.50 and if you can supply the rest of the cargo making up the 6200 tons, there will be absolutely no loss on this contract.

"The writer was advised recently by Grace & Company that should we fall short or over about 75 or 100 tons that it would be entirely satisfactory to them.

"Trusting this action meets with your entire approval," etc.

The next is a letter dated May 12, 1916, from Ford Motor Company of San Francisco to respondent:

"We wired you on the 6th to advise us immediately quantities for 'Cacique' for Wellington and Sydney. This information as we have spoken of in another letter is absolutely necessary for Grace & Company to have in order that they may properly [237] figure their storage.

"On May 8th we received reply to this wire, in which you stated the number of cars you were shipping for Wellington and Sydney, and as the pre-

vious wires of May 1st and 5th were somewhat different in regard to tonnage, we are still at a loss to figure just exactly what the remaining tonnage for Wellington will be which you advised you will ship on May 11th.

"Therefore, please let us know as soon as possible as far as you can the total amount of tonnage for this boat, also just how much will be discharged at Sydney and Wellington."

Letter of May 13, 1916, from Ford Motor Company, San Francisco, to respondent, reading as follows:

"We have yours of the 5th advising of the forewarding of CMStP. 78162 carload of parts for Australia and New Zealand, to connect with the 'Cacique.'

"We trust you will keep us thoroughly advised as to the complete amount of tonnage in these part shipments that you anticipate shipping on this boat as we do not wish to contract for any more space with other concerns unless it is absolutely necessary. Also kindly advise us approximate amount of tonnage in each of these part shipments as soon as possible."

Letter of May 20, 1916, from Ford Motor Company of Canada, signed by Pritchard, to Ford Motor Company of San Francisco, reading as follows:

"Cacique—Peabody Space.

"We refer to your letter of May 13th.

"We have written you a concurrent letter indicat-

ing the fact that there has been a misunderstanding in connection with the space on the 'Cacique.' We had not assumed that we were going to be held for 6200 tons space, and when the request was received [238] from Peabody & Company, we immediately referred them to Messrs. Grace & Company. We assumed that their arrangement had been made with Grace & Company, and preferred that it should have been made with them in order to relieve this Company of any liability.

"We will therefore have you refer Messrs. Peabody & Company's contract to Messrs. Grace & Company."

Letter dated May 20, dictated on the 19th, from respondent to Ford Motor Company, San Francisco, attention Mr. L. C. Davis:

"We have your letter of May 13th requesting that we keep you advised as to number of shipments we forward for connection with the steamer 'Cacique.'

"We advised you in a letter several days ago complete contents of the first three carloads that went forward to you for the above steamer, and might also advise you that we forwarded to-day a fourth carload consisting of the following:—

Port.	No. Boxes.	No. Cu. Ft.
Sydney	36	570
Adelaide	10	60
Melbourne	19	367
Wellington	7	258
Perth via Freemantle	3	21
Brisbane	3	43
Hobart, Tasmania	2	14

"At the present time we have no more parts on order for dealers in Australia and New Zealand. If we receive orders in the course of the next few days that can make connections with the above steamer we will advise you promptly."

Mr. WILLIAMSON.—Now, Doctor, you will see that that is the fourth shipment. The one I offered you a few moments ago and that you thought was not complete, covered three shipments. They say here, 'We advised you in a letter several days ago of three complete carloads.' Now you have the data for the fourth, [239] and, therefore, everything up to date.

Mr. HENGSTLER.—Up to date, May 20, 1916, four carloads were shipped.

Mr. WILLIAMSON.—They were apparently sent forward in that way.

Mr. HENGSTLER.—The next is a letter dated May 25, 1916, dictated May 23, from respondent, signed by Pritchard, to Ford Motor Company, San Francisco, reading as follows:

"Re 'CACIQUE.'—Attention Mr. Davis.

"The question of space on this steamer is giving us a great deal of concern at the present time.

"You will recollect the inception of this transaction was not understood by this company. For a considerable length of time we did not know what if any arrangements you had made with the owners of the 'Cacique.' During this time we entered into negotiations for the forwarding of cargoes on the steamships Whakatane and Pakeha.

We would not have accepted these arrangements had we known your arrangements were completed.

"You will further recollect that the contract you signed did not carry through to us and it was not until we received a copy of this contract that we really knew the details of this transaction in their entirety.

"Even at that time we had sufficient tonnage to make up this full cargo. We had warned the factory to make their experiments conclusive at the outset in the knocked down method of shipment. We had warned them that cutting down the space on the knocked down shipments during the progress of the filling of any contract would materially alter our calculations. They, however, went forward with these experiments and we really did not appreciate the extent of the saving until we came to tote up the amount of [240] space which we still had to fill on the steamer 'Cacique.'

"We accepted your notification of some time ago that we still had some 542 odd tons space to fill, believing from the nature of your communication that the W. R. Grace Company were not holding us for the full amount as you knew the measurements of our cars as going forward. When you arranged this contract with Peabody & Company for 542 tons we thought that we were absolved from further performance.

"However, if we are in for it for this 1500 odd tons space which, notwithstanding the Peabody contract which we figure we still have to take care of

upon the steamer 'Cacique,' we want you to use every means in your power to sub-let this space.

"We have suggested to you borrowing 1500 tons from the Union Steamship Company and replacing this to them later on, in addition to the 2000 tons which we still have to go forward by their steamships in fulfillment of our contract for 10,000 tons space by that line. This should be more or less easy of accomplishment with the Union Steamship Company by reason of the fact that we notice concurrent information going through from railway companies that the Union Steamship Company have obtained the steamship Florivan, sailing in July. This notice also states that the Union Steamship Company have had four of their steamers commandeered. We presume this was in addition to the steamer which you advised us would be commandeered upon its arrival at Sydney.

"We also are awaiting advice from our Australian Branch representative at Melbourne as to the reshipment of 255 cars which have been practically lost by the foundering of our sailer Normandy off the Barbadoes Islands.

"We are still awaiting advise to rewrite and reship these [241] orders and if we receive it in time we will reship them by the Cacique.

"It is not well, however, to depend upon this and we would ask you to make every effort in your power either to borrow this space from the Union Steamship Company or sub-let it on our behalf.

"We trust your endeavors in this respect will meet with success."

Letter of May 27, 1916, from Ford Motor Company of San Francisco, to respondent, reading as follows:

"Cacique—Peabody Space.

"Please refer to your letter of the 20th inst., regarding contract secured with Peabody & Company covering 542 tons for the 'Cacique.'

"We endeavored to release this space to W. R. Grace & Company, the contract to be between themselves and Peabody but this they declined to do, and as the contract specifically states that the cargo in question must be en route prior to June 1st, we are perfectly safe and the shipment will reach here in ample time to make connection with this boat."

The COURT.—We will meet to-morrow at ten o'clock.

(An adjournment was here taken until to-morrow, Wednesday, November 17, 1920, at ten o'clock A. M.)

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [242]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Honorable MAURICE T. DOOLING, Judge.

VOLUME 3.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation,

Respondent.

Wednesday, November 17, 1920.

COUNSEL APPEARING:

For the Libelant: L. T. HENGSTLER, Esq.

For the Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. HENGSTLER.—I offer in evidence a letter from Ford Motor Company of San Francisco to respondent, dated May 27, 1916, reading as follows:

"We wish to confirm our telegram to you of even date as follows:

" 'Cacique will sail about July 10th.' "

Letter from Ford Motor Company of San Francisco to respondent, dated May 27, 1916, reading as follows:

"With regard to space on the 'Cacique' which you will not be able to fill and for which we are obligated, we have been doing our utmost to secure tonnage at $47.50. Our most likely [243] prospect *as* been Dodge Brothers about which we wired you on the 26th, stating that they had about 200 cars. Their San Francisco representative advised that it was his belief they would not be willing to pay $47.50, and we thought that perhaps you might be able to complete with Dodge Brothers satisfactory arrangements yourselves.

"We have been offered a shipment of pianos at $40.00 with additional brokerage fees. This cargo of pianos is on hand warehoused here in case it is necessary that we use them.

"The Illinois Central, through their San Francisco General Agent, Mr. C. Haydock, have been very active in our behalf and at present are doing through their office here everything possible to assist us in some manner, they endeavored in every way possible to induce the Union Company to allow us to take some of the cargo which they had booked for the 'Coolgardie' and 'Waimarino.'

"The writer also was in conference with the Union this morning along these lines, but unfortunately the 'Waimarino' and 'Coolgardie' sail from this port prior to the sailing date of the Cacique and, of course, the Union cannot allow us cargo intended for these boats.

"We are expecting momentarily to hear from prospects about which telegrams have been sent

East and therefore if you are able to complete arrangements in any respect, we trust that you will advise us immediately. We intend to go on and secure cargo if it is possible and if successful will promptly wire you."

Telegram from respondent to Ford Motor Co. of San Francisco, dated May 31, 1916:

"Illinois Central today informed us transfer fifteen hundred tons Union Steamship cars now on coast unshipped arranged for to Cacique advise immediately quantity being transferred by [244] Ports."

I might suggest, your Honor, that there is another file which I have not been able to see yet, and if Mr. Williamson would follow that file to see what letters I have not here, it would expedite matters.

Mr. WILLIAMSON.—I am noting the ones you are not reading.

Mr. HENGSTLER.—And you can insert any which I am not reading, though I would like to see them afterwards.

Mr. WILLIAMSON.—Do you want to see them now?

Mr. HENGSTLER.—No, afterwards; I cannot see them now.

Night letter from Ford Motor Company, San Francisco, to respondent, dated May 31, 1916, reading as follows:

"Regarding Illinois Contract. Union Company say all cars at present here will leave by Coolgardie June 1st, Waimarino or Floridian end of June.

Any cars here after July 1st, they will give to Grace provided you will guarantee sufficient cars in equal quantities spread over August Septemeber October to finish contract. Can you not complete this cargo with reshipments of foundered Normandy cargo. Wire definitely."

Letter from respondent to Ford Motor Company of San Francisco, dated May 31, 1916, signed "Pritchard," reading as follows:

"We are enclosing confirmation of our wire to you today. This follows the writer's perusal of the wire received by the Illinois Central from Mr. Haydock their San Francisco representative, indicating that the Union Steamship Company are agreeable to transfer 1500 tons cargo to the S. S. 'Cacique,' of cars which have yet to clear on the Union Steamship boats.

"We also enclose copy of draft memorandum agreement which we are forwarding through Illinois Central R. R. to the [245] Union Steamship Company in this respect.

"It is a matter of considerable surprise to us that the Illinois Central R. R. Co. should have been able to procure this concession when our own efforts failed.

"It is a further surprise to us to note that up until Saturday last, we were still led to believe that the 'Cacique' would sail on the 14th of June. This was the latest information from you. We had to do considerable wiring to get any different information.

"This is not in the nature of a complaint, but in-

dicating only the handicap such lack of information places us under at this end. This information relayed to Australia some time ago would have allayed a considerable fear on their part that shipments would arrive piling up one on the other causing congestions to a considerable degree.

"We wish you would make the fullest disclosure of anything relating to contracts, shipments and sailings in order that we may keep thoroughly in touch with you."

Mr. WILLIAMSON.—Are you going to read the memorandum attached to that letter, Doctor, and which is referred to as the enclosure?

Mr. HENGSTLER.—The memorandum referred to by Mr. Williamson reads as follows:

"In consideration of the Union Steamship Company transferring to W. R. Grace & Company for their Steamer Cacique fifteen hundred (1500) tons of our automobiles, we agree to replace these automobiles to the Union Steamship Company for carriage to Australia during the months of August, September and October under the same exigencies as set forth in the original contract entered into in this behalf, the Union Steamship Company to notify us the [246] dates of sailings in those months for the above quantity.

"We also agree to ship during the months of August, September, October, November and December approximately two thousand (2000) ton shortage upon original contracts for ten thousand (10,000) tons entered into between us under the

same exigencies governing the original contract in that behalf.

"Dated May 31st, 1916."

There is no signature to this agreement. Is it admitted, Mr. Williamson, that the Union Steamship Company never did transfer to W. R. Grace & Co., for the steamer "Cacique" 1,500 tons?

Mr. WILLIAMSON.—Yes. It is admitted that on June 1st the Ford Motor Company of Canada, Ltd., respondent here, had a wire from Haydock, and pursuant to that drafted this agreement, but the Union later did not carry it out.

Mr. HENGSTLER.—Letter of June 1, 1916, from Ford Motor Company of San Francisco, to respondent, reading as follows:

"We wired you last night as follows:

" 'Regarding Illinois Contract, Union Company say all cars at present here will leave by Coolgardie June 1st, Waimarino or Floridian end of June. Any cars here after July 1st they will give to Grace provided you will guarantee sufficient cars in equal quantities spread over August September October to finish contract. Can you not complete this cargo with reshipments of foundered Normany cargo? Wire definitely.'

'There has been a misunderstanding in this regard and receipt of your wire this morning advising the Illinois Central stated Union would be willing to allow us 1500 tons at present in San Francisco is misleading. As our wire would indicate this is not the case. [247]

"We have had this matter up on a number of occasions with the Union Company and they emphatically state that they must carry cars which are here and which are booked for their steamer 'Coolgardie' which clears today and their 'Waimarino' or 'Floridian' which will clear late in June. As they have already allotted cargoes of machines for this boat and arranged other cargo accordingly, you will see it is quite impossible for them to alter this condition.

"However, they are willing to allow us to have any cars which might arrive later than July 1st or after the 'Floridian' or 'Waimarino' sail which we can turn over to Grace & Company for the 'Cacique.' This, however, is quite uncertain and we are very much in hopes that you will be able to rewrite and reship the sailer 'Normandy's' cargo as this would very nicely complete the 'Cacique' cargo and the situation would then be nicely cleaned up."

Day letter from the Union Steamship Co. of New Zealand, Ltd., to respondent, dated June 1, 1916:

"Understand there is misunderstanding here about quantity cars you are shipping we wish it understood that all cars now in San Francisco will go forward by our own steamers and that we cannot give any of these cars to Grace Company"—

Mr. WILLIAMSON.—Doctor, that is something you did not ask me for. I left it in the file. It is really covered by my admission of a moment ago that the Union did not make the change. That is all that is embodied in that wire.

Mr. HENGSTLER.—Let me finish reading it, first.

Mr. WILLIAMSON.—But if you read it into the record you will simply confuse the record.

Mr. HENGSTLER.—It is a communication directly in line with [248] the other communications, and I would like to read the balance of it:

"Undertsand there is misunderstanding here about quantity cars you are shipping we wish it understood that all cars now in San Francisco will go forward by our own steamers and that we cannot give any of these cars to Grace Company but we are willing to give Grace portion of our consignment which has not reached us yet provided you replace the quantity we let go. Please advise exactly how many tons of cars coming forward July, August, September, October, in order we can arrange space. Your failure to carry out contract with us has caused great inconvenience to us as we have chartered at high rates to keep faith with you."

Telegram from respondent to the Ford Motor Co., San Francisco, dated June 1, 1916:

"Arrangements with Illinois Central here is that fifteen hundred tons automobiles of those already shipped are to be transferred to Grace and Company stop we are signing new contract with Union today agreeing to replace this fifteen hundred tons and ship balance of contract about two thousand tons that is thirty five hundred tons in all during August and following months as directed by Union stop we have shipped for Union two thousand one hundred twenty four Automobiles and for Grace

twelve hundred and ninety Autos stop the cars are to be transferred from those already shipped stop we have no further shipments until August first."

This telegram is out of order, but the same date as the other ones.

Mr. WILLIAMSON.—It is the confirmation referred to in the letter. [249]

Mr. HENGSTLER.—Yes.

Night letter, from respondent to Ford Motor Co., San Francisco, dated June 5, 1916:

"Advise what prospects obtaining 'Cacique' cargo stop Dodge offers thirty five have not accepted.

Night letter from Ford Motor Company, San Francisco, to respondent, dated June 8, 1916, reading as follows:

"Your night letter seventh Have you inland loadings etc will mail ocean ladings immediately on receipt from railroad covering four carloads of parts. Stop. Your night letter seventh Waihomo should read Wairuna. Sets forty one and fifty nine cleared Coolgardie third. Stop. Cacique now five days out from Shanghai Due here about twenty seventh. Three days left to discharge cargo in June. Our contract reads June loading. Does not their failure to complete loading our cars in June automatically cancel contract. That is opinion here. Stop. Unless you intend reshipping Normandy cargo we think best to stand firm on June loading."

Telegram from respondent to Ford Motor Co., San Francisco, dated June 9, 1916, reading as follows:

"Owing congestion large quantity cars arriving Australia at one time may be necessary to cut down Cacique cargo by Sydney Brisbane and Melbourne cars and ship these later stop if this is done can you arrange storage these cars Frisco or will free storage apply stop do not load any cars Cacique unless Grace agree that their default has voided any alleged contract and that forty six hundred tons less what may be held as above will be loaded at Forty seven fifty per ton and this cargo will not be held for freight for the balance stop without prejudice to this position our connections here can likely supply Cacique with other cargo at thirty five dollars." [250]

Letter from Ford Motor Co., San Francisco, to respondent, dated June 9, 1916, reading as follows:

"We wired you last night as follows:

" 'Your night letter seventh Have you inland ladings etc. will mail ocean ladings immediately on receipt from railroad covering four carloads of parts. stop. Your night letter seventh Waihemo should read Wairuna. Sets forty one and Fifty nine cleared Coolgardie third. stop. Cacique now five days out from Shanghai. Due here about twenty seventh. Three days left to discharge cargo in June. Our contract reads June loading. Does not their failure to complete loading our cars in June automatically cancel contract. That is opinion here. stop. Unless you intend reshipping normandy cargo we think best stand firm on June loading.'

"We have been investigating the matter regarding this contract and if our memory serves us correctly there is one paragraph which spoke of June loading. Of course, as you know in the parlance this might indicate June sailing but that does not necessarily follow.

"However, the Cacique at the present time is several thousand miles from here and her being a ten knot boat will not bring her here before the 27th inst. Immediately on arrival here her cargo will be discharged and she will be reloaded. We are not at present in a position to state what her cargo is from the Orient but as tea is now moving in large quantities, we presume that this will constitute the major portion, in addition to general merchandise for the Chinese stores, curious, etc.

"We figure that it will take at least three days with a large force of men to discharge her. It will then be about the 30th of June and unless our cargo is entirely aboard, it is the [251] opinion of the steamship men here, and especially our friends, the Union Steamship Company, that the contract is worth very little and if Grace & Company, as they indicated to the writer recently, intended to stand firm and collect their charges for full 6200 tons, we can no doubt stand firm and declare our contract automatically cancelled.

"Would like to hear from you along these lines, giving any instructions you would like to have this department carry out."

Mr. WILLIAMSON.—Doctor, the word "intended," the "ed" is stricken out in the original;

that being a carbon copy you are reading from, I presume it was not stricken out there. Very evidently a change was made by the writer before the letter was sent.

Mr. HENGSTLER.—All right; then it should read: "intend to stand firm," instead of "intended to stand firm."

Telegram from respondent to Ford Motor Co., San Francisco, dated June 9, 1916, reading as follows:

"We have already written Grace and Company that sailing date in July voids any contract even admitting there is one binding on this Company which we do not. Stop. From the outset we have made it clear that we consider ourselves bound for four thousand and seventy-six tons plus Peabody space that is forty-six hundred tons. Stop. Before any cars loaded on Cacique see that this understood with Grace so that the loaded cargo will not be held for entire freight; otherwise do not load any. Stop. If Grace wish us to assist them without prejudice to this position we can possibly arrange other cargo here thirty-five dollars per ton."

Telegram from respondent to Ford Motor Co., San Francisco, [252] dated June 10, 1916, reading as follows:

"Our wire ninth have decided to not hold up shipments to Sydney Brisbane Melbourne stop Will load forty six hundred tons all told provided Grace agree this is in fulfillment of any contract and will not hold what loaded for entire freight."

Night letter, Ford Motor Company, San Fran-

cisco, to respondent, dated June 13, 1916, reading as follows:

"Grace insist on sixty two hundred tons or freight on unused space. They intimate suit and will probably attach all cars here. They say you have nothing to stand on. Please give us copies of all correspondence you have with Grace. Cacique left Shanghai June fifth. Last report June eighth she was seven hundred fifteen miles out. Wire instructions."

Letter of June 22, 1919, from Ford Motor Co. of San Francisco, to respondent, reading as follows:

"We have not heard from you regarding the 'Cacique' situation. The boat is nearing this port and we are still wondering what you intend to do.

"Our attorney here is strongly of the opinion, as we wired you, that phrase 'June loading' means that the entire consignment must be put aboard the vessel in June. The writer has interviewed several steamship companies and the opinion seems to carry through each one.

"Davis and Cornyn, from whom you recently received wire regarding one thousand tons, now offer about 16,000 cases of oil for Wellington, Sydney and Melbourne. This is eight thousand tons but the commodity does not carry a very substantial rate,—$24.00 being about the most we can figure on. Of course, we have no authority here to give them any satisfactory answer and they must have their reply as quickly as possible. [253]

"We have issued instructions to the Southern Pacific Company, who now have in their possession

all of the consignment for the 'Cacique,' to hold same until they receive from us instructions to deliver to Grace and Co.

"It is our impression that W. R. Grace and Co., will bring suit and, as previously advised, attach the shipment. In the writer's recent conversation with Mr. Carter, the president of the local company, the gentleman stated his intention of writing to Mr. J. H. Rossiter, who is the head of Grace and Company giving him all the data on the case and requesting him to stop off at Detroit on his return to San Francisco and there consult Mr. Henry Ford as to the proper steps to take. He stated that he did not think Mr. Ford would agree to any such actions on our part, as he stated, in not keeping good faith to our contract.

"We are merely giving you this for your information so that you may know the feeling that exists in Grace and Company's office here.

"The writer does not think that any such action will be taken by Mr. Carter but he does think that Grace and Company intend to demand from us the full price of 6200 tons."

Letter from Ford Motor Co. of San Francisco, to Mr. W. J. Hardie, Southern Pacific Co., Fourth and Berry Streets, San Francisco, Cal., dated June 22, 1916:

"Dear Sir: Attention Mr. Frank Renz, Steamer Clerk.

"Confirming our telephone conversation of recent date: Until you are advised to do so, please do not, under any circumstances, deliver any of the cargo

at present on hand booked steamer 'Cacicue' to W. R. Grace & Co.

"FORD MOTOR CO.,
"Traffic Department.
"L. C. DAVIS." [254]

Telegram from respondent to Ford Motor Company, San Francisco, dated June 24, 1916:

"Advise if Grace are owners 'Cacique' or merely brokers for owners; rush reply day wire."

Telegram from respondent to Ford Motor Co., San Francisco, dated June 26, 1916, reading as follows:

"Advise rush day message whether 'Cacique' is American vessel where and under what flag registered stop will give full instructions what course to follow night message tonight."

If your Honor please, I have not the other file yet. If your Honor will grant me a minute, I will ask Mr. Williamson whether there are any additional letters in it.

Mr. WILLIAMSON.—Most of these are duplicates. Of course, I did not know that you were not reading them all. You can take this file and take anything out of it you may wish. Most of them are duplicates. Some of them, I know, are missing; necessarily, each office makes up its files a little differently. For instance, here is a letter from Mr. Davis under date of April 3d. I don't know whether you read that, or not. I can tell you what you did not read this morning, because I have kept track of it. Here is a letter of June 22, which you

did read, the Grace & Co. letter of June 22, which is already in the record.

Mr. HENGSTLER.—I think these letters have a bearing. I cannot determine at the present time, however, about all these, I would like to go through them. Here is something I would like to have in the record.

Telegram from respondent to Ford Motor Co., San Francisco dated June 28, 1916, reading as follows: [255]

"Johnson and Higgins underwriters 'Cacique' insurance will see you. Stop. Have them consult Williamson and Sutro. Stop. They may have certain rights to insist upon before loading 'Cacique' which would help."

Mr. WILLIAMSON.—Now, this letter you are looking at, Mr. Hengstler, will not be understood unless I make a statement about it.

Mr. HENGSTLER.—Let me look at it first.

Mr. WILLIAMSON.—But the record will be confused, unless I make a statement about it.

Mr. HENGSTLER.—I will say now that I will not use any of these unless they become important to the case.

The COURT.—Has it to do with the action already begun?

Mr. WILLIAMSON.—Yes, your Honor, with the action already begun. I would like to state, so that the record is not going to be encumbered by something we cannot explain at some later date, I will say to your Honor—

Mr. HENGSTLER.—It is not even necessary to explain it, Mr. Williamson, unless I use it. I will not use it unless something comes out in the defense which will make it of importance.

The COURT.—Well, let us hear it.

Mr. WILLIAMSON.—After the suit was filed, we wired the contents of the bill to the Ford Motor Co. of Canada, and made immediate effort for Johnson & Higgins to get bonds to release the cargo.

Mr. HENGSTLER.—I desire to offer in evidence a letter from respondent to Ford Motor Co., San Francisco, dated June 13, 1916, and reading as follows: [256]

"We have received letter from Messrs. W. R. Grace & Company, of which attached is a copy. This letter refers to letter of June 6th to yourselves. We are enclosing copy of our letter to Messrs. W. R. Grace & Co. in reply.

"Will you please also write Messrs. Grace & Company and inform them that the 4075 odd tons is the full cargo for the S.S. 'Cacique'; that we recognize no contract binding upon this Company to forward 6200 tons for this vessel, and that unless the 4075 tons is taken on this understanding, and not subject to freight for 6200 tons, we will not load any of this cargo."

I offer in evidence a letter from Ford Motor Co., San Francisco, to respondent, dated June 7, 1916, reading as follows:

"We wired you yesterday as follows:

" 'Coolgardie delayed account longshoremen's strike. Cleared third Set numbers 32 to 46 in-

clusive, 48 to 50 inclusive, 52, 53, 55, 57, 59, 138 A and B, 140 A and B, 141 to 143 inclusive, 145, 146, 147B. Total freight charges including parts Eighty Three Thousand Six Hundred Nine Dollars Sixty Cents. stop. Our best prospect for Cacique is Dodge. Endeavor to close best possible figure. Get freight moving. Grace now figure 'Cacique' will clear about July fifth.'

"As indicated the Coolgardie was delayed account longshoremen's strike which is still unsettled.

"Referring to your letter of the 31st enclosing copy of contract which you advise Illinois Central secured, you have undoubtedly been advised of the true state of affairs ere this writing and we do exceedingly regret this unfortunate misunderstanding, but our previous wires to you have not deviated from our original stand in any way and we have correctly informed you as to the stand which will be taken by the Union Steamship Company. [257]

"It now transpires as you know, the rates are going down to a more normal basis and it is impossible for us to secure tonnage at $47.50, although we have had offers of $35.00.

"We sincerely hope that you will be able to fill the space with your own cars rather than let it go to any other concern for a lower figure.

"Regarding the change of dates of Cacique sailing, information has come to us which had not previously been made public to the effect that the Cacique had met with an accident after leaving Vladivostok, Russia, which necessitated repairs and again it was necessary to put her on the ways in

Hong Kong which further delayed the boat and we were only recently informed of this change, although the movements of the boat had let us to believe that it would be much later than the middle of June before her departure, and it is now our hope that she will even be as late as the 10th of July as we wired you recently.

"FORD MOTOR COMPANY.
"Traffic Department,
"L. C. DAVIS."

A wire from respondent, to Ford Motor Co., San Francisco, dated June 5:

"Advise what prospects obtaining Cacique cargo. Stop. Dodge offers thirty-five. Have not accepted."

A letter from respondent to Ford Motor Co., San Francisco, dated June 3, 1916, reading as follows:

"In accordance with Mr. Grandjean's letter of even date and following our procedure outlined therein, we are sending you under separate registered mail today three copies of all invoices covering autos and parts and two copies of all bills of lading covering same which we expect to go forward on the following steamers— [258]

Coolgardie	June 3rd
Waimarino	June 30th
Cacique	July 12th

"Trusting these documents will arrive in good order, we are," etc.

Who is Mr. Grandjean?

Mr. WILLIAMSON.—He is one of the Sales Department of the respondent.

Letter from Ford Motor Co. of San Francisco, to respondent, dated May 27, 1916, reading as follows:

"We are in receipt of advice from Mr. J. G. Stubbs, General Agent Southern Pacific Company, San Francisco, in which he advises receipt of telegraphic communication from Mr. R. S. Stubbs of New York to the effect that Muller-McLean Company offer $40.00 per ton for twenty to thirty automobiles July clearance Australia and New Zealand.

"We have not signified our intention of accepting this offer but merely submit it to you for your information.

"If you care to go further into the matter, please advise us by wire."

Telegram from respondent, to Ford Motor Co., San Francisco, dated May 27, 1916, reading as follows:

"Advise day message date of Cacique sailing."

Letter, from Ford Co. of San Francisco to respondent, dated May 26, 1916, reading as follows:

"This will confirm our night letter to you under date of May 24th as follows:

" 'Your wire yesterday. We have already contracted for five hundred forty two tons with Peabody. Are now endeavoring to secure about one thousand tons. Thus far unable to get Forty Seven Fifty although sufficient tonnage is offered. Best quotation to [259] date probably Forty two Fifty."

Telegram from respondent, to Ford Motor Co., San Francisco, dated May 26, 1916, reading as follows:

"Cacique total cargo from factory will be four thousand and seventy-five tons—Advise immediately when vessel sails—also what amount of shortage you can dispose of and figure—Hurry please."

Telegram from respondent to Ford Motor Co., San Francisco, dated May 25, 1916, reading as follows:

"Deny we are offering space New York except for August sailing."

Telegram, from respondent to Ford Motor Co., San Francisco, dated May 23, 1916:

"Do everything possible to sublet Cacique fifteen hundred tons if cannot borrow from Union as it looks as if we cannot get out the thousand tons additional of which we advised yesterday. Stop. Advise prospects immediately."

Telegram from respondent to Ford Motor Co., San Francisco, dated May 22, 1916, reading as follows:

"Cannot give you balance of contract in July not likely until August and following months. Stop. We notice that 84 Brisbane 108 Howard 84 Sydney originally scheduled for Wairua do not appear to be clearing by Wairuna. In view of Union being behind on its schedule would it not be possible to transfer these cars to Cacique and replace to Union later on in year? Advise."

Telegram, from respondent to Ford Motor Co., San Francisco, dated May 19, 1916:

"Advise Grace Sydney 762 tons Wellington 1188 tons. Stop. Will likely give about another thousand tons for Melbourne making [260] fifty seventy-five tons shipped from here leaving a short-

age of about six hundred tons. Stop. See if you can arrange Union to take this shortage from cars shipped for steamers not yet sailed or that should have gone on steamers already sailed replacing to Union Company later. Stop. Have Grace communicate with Sutton Company direct."

Telegram from Ford Motor Co., San Francisco, to respondent, dated May 19, 20th, 1916, reading as follows:

"Please reply our wire seventeenth regarding total tonnage for Cacique must know how much space to fill stop Understand Francis M. Sutton seventeen Battery Place New York has car for Australia please ascertain and advise."

Telegram, from Ford Motor Co., San Francisco, to respondent, dated May 18:

"Your wire May fifth indicates five thousand eighty seven tons total for Cacique May sixteenth you advise total four thousand eighty four tons wire immediately exact Cacique tonnage in order we can contract for Unused space probability unable secure rate forty seven fifty unless we can complete cargo we will have severe loss please advise definitely."

Night letter, respondent to Ford Motor Co., San Francisco, dated May 16, 1916, reading as follows:

"Total Cubic measurement on shipments for 'Cacique' for Sydney seven Hundred and Sixty-one tons—Wellington One Thousand and One Ninety tons, other ports Two Thousand and seventeen tons four carloads of parts One Hundred and sixteen tons—Total Four Thousand Eighty-four tons."

Telegram from Ford Motor Co., San Francisco, to respondent, dated May 15, 1916, reading as follows: [261]

"Your letter fourth mailed New York by mistake concurrent letter advising ports and quantities not received. Please wire without fail Tuesday morning total cubic measurement shipments for Cacique for Wellington and Sydney stop Grace and Company must have this information immediately to figure steamers stowage and further cargo requirements."

Letter, Ford Motor Co., San Francisco, to respondent, dated May 13, 1916, reading as follows:

"We are enclosing herewith copy of letter received from Henry W. Peabody & Company, San Francisco, which has direct reference to our contract with them covering 542 tons space on the Steamer 'Cacique.'

"Kindly advise us your opinion regarding this feature, and oblige."

I offer in evidence an agreement made in letter form between respondent and Henry W. Peabody, reading as follows:

"San Francisco, May 5, 1916.

"W. R. Grace & Company's SS. 'Casique.'

"This agreement is entered into by Henry W. Peabody & Company, 255 California St., San Francisco, and the Ford Motor Company of Canada, Ltd., Walkerville, Ontario, and covers 542 measurement tons of 40 cubic feet each per W. R. Grace & Company's SS. 'Cacique,' loading at San Fran-

cisco about July 1st for Sydney and Wellington. Cargo for said space to be delivered alongside of steamer at San Francisco as fast as vessel can load, otherwise shipper to pay demurrage at the rate of $3,000.00 per day. Freight to be prepaid at rate of $47.50 per ton of 40 cubic feet measurement.

"FORD MOTOR COMPANY OF CANADA, LTD.,

"By L. C. DAVIS. [262]

"Accepted.

"HENRY W. PEABODY & CO.,

"J. B. CARLTON."

There is a foot-note to that agreement, as follows:

"It is further agreed that demurrage mentioned above is only payable provided cars do not leave Factory before June 1st, 1916, and it is also agreed that entire shipment will be in transit not later than June 1st."

Letter, from respondent, to Ford Motor Co., San Francisco, dated May 11, 1916, marked "Dict. May 10th":

"We refer you to our letter of April 28th in which we asked you to ascertain how many cars the Union Steamship Company contemplated they would shortship on our contract.

"If you find that the Union Steamship Company are not going to be able to take care of our contract to the end of May as anticipated, we want these transferred to S. S. Cacique.

"All of our Union Steamship cars must go by the end of May."

Letter, from respondent to Ford Motor Co., San Francisco, dated May 6, 1916, reading as follows:

"In order as far as possible to approximately fill our reservation by this boat it will be necessary for us to turn down extremely favorable rates out of the Port of New York.

"We wish you would let Grace & Company know this.

"We enclose copy of wire received from our New York Foreign Department in which they quote us a firm rate of $40.00 out of New York. You will understand how extremely favorable this rate is when we have so much less inland freight to pay."

Telegram from Ford Motor Co., San Francisco, to respondent, dated May 2–3, 1916, reading as follows:

"Your wire today Cacique contract still 540 tons short [263] can you complete it otherwise we must secure other cargo at probable loss please reply immediately."

Wire from respondent to Ford Motor Co., San Francisco, dated May 1, 1916, reading as follows:

"We start Cacique contract today—writing full particulars as to quantity ports and dates of shipments 1316 cars in all. Sending list showing railway cars comprising four thousand and six thousand ton contract."

Telegram, from Ford Motor Company, San Francisco, to respondent, dated April 3, and apparently received on the 4th, reading as follows:

"Refer our letter March first enclosing contract with W. R. Grace their Steamer Cacique we are

definitely compromised for sixty-two hundred tons for this vessel otherwise dead freight will be payable on any unshipped quantity."

Telegram, from Ford Motor Co., San Francisco, to respondent, dated March 29–30, 1916, reading as follows:

"Your wire yesterday Steamer Cacique goes Wellington Sydney only; see contract; you should arrange sixty-two hundred tons accordingly arbitraries as advised."

Letter, from respondent to Ford Motor Co., San Francisco, dated March 28, 1916, reading as follows:

"S. S. Cacique.

"We are enclosing confirmation of wire to you, which intimates that we have no further needs until July. We mean by this, that we will not ask you to go actively into the market until about that time in anticipation of our needs commencing August 1st when a new contract year commences with our Australian dealers.

"You stated some time ago that you had arranged for the [264] S. S. Cacique, of which the capacity was 6200 tons. As indicated to you, we will need only 4284 tons of this capacity.

"That we do not need the 6200 tons, is due to the fact, that we have succeeded in obtaining two steamers from the New Zealand Shipping Company, one sailing out of St. John on the 20th of April and one sailing out of Montreal on the 20th of May, taking a considerable number of cars which otherwise would have had to go by Steamer Cacique

(Testimony of Harvey E. Moore.)

and by other arrangements out of the port of San Francisco."

The COURT.—We will meet at two o'clock.

(A recess was here taken until two o'clock P. M.) [265]

AFTERNOON SESSION.

Testimony of Harvey E. Moore, for Libelant (Recalled).

HARVEY E. MOORE, recalled for the libelant.

Mr. HENGSTLER.—Q. Mr. Moore, relative to the 1100 packages which were deposited by the Southern Pacific Company on the "Cacicue" wharf on June 22, 23, and 24, what communication, if any, did you have with officers or representatives of the Southern Pacific Company?

Mr. McCUTCHEN.—I object to that as irrelevant and immaterial. That freight is alleged to have been received, or those packages are alleged to have been received as freight, and it has been testified by the manager of Grace & Co. positively and unequivocally that they were in the hands of Grace & Co. on the day on which this libel was filed as freight.

The COURT.—The objection will be overruled.

A. I am unable to fix the date positively, but about that time I received a telephone message from—

Mr. McCUTCHEN.—One moment: About what time?

A. About the time that Mr. Hengstler mentions, June 23d, or 24th, sometime in that locality.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—Mr. McCutchen, we will admit that the Southern Pacific Company deposited those packages on June 22, 23 and 24, altogether 1100 packages, that were deposited on the wharf.

Q. Go ahead.

A. I received a telephone message form the local office of the Southern Pacific Railway Company, I think from Mr. Renz, stating that the delivery of that cargo to the "Cacicue" had been held up, on instructions received, I believe, from the Ford Motor Co., [266] or from Mr. Davis, I don't remember which. I immediately went out to Mr. Hardy's office—Mr. Renz was an employee of Mr. Hardy's office—and Mr. Renz confirmed to me what he had told me by telephone, and he introduced me to Mr. W. J. Hardy, the agent of the Southern Pacific Company, who confirmed what Mr. Renz had told me, and they were both considerably disturbed.

Mr. McCUTCHEN.—One moment. I object to that.

The COURT.—Yes.

Mr. HENGSTLER.—Say as nearly as you can what they did—what they said, as nearly as you remember it.

Mr. McCUTCHEN.—One moment; I object to that upon the further ground that we are not bound by conversations.

The COURT.—Yes. The only thing that is material is the fact, itself. I am not quite sure that that is. It may have some bearing on the commencement of the action; that is the only way I can see it

(Testimony of Harvey E. Moore.)

has any bearing; the fact, itself, is the only thing that is material; the details of it, and how much they were disturbed over it, is not material at all.

Mr. HENGSTLER.—Q. Did they tell you how these packages happened to be deposited by them on the wharf?

Mr. McCUTCHEN.—One moment. I object to that. The packages were there.

The COURT.—The objection will be overruled.

A. I don't remember that they did. Mr. Hardy asked me if he could get back the packages which had been delivered to the wharf, and I told him that I had no authority in the premises whatsoever.

Q. Will you try, if you can, to remember whether they did give you a reason—whether they did give you information as [267] to how it happened that those cars were deposited on your wharf?

Mr. McCUTCHEN.—I object to that as irrelevant, immaterial and incompetent.

The COURT.—The objection will be overruled.

Mr. McCUTCHEN.—May I be heard just a moment: I object to that on the further ground that the witness has been asked what they said to him, and he has repeated it as nearly as he can remember.

Mr. HENGSTLER.—I am asking him—

Mr. McCUTCHEN.—The witness should not be cross-examined by counsel.

The COURT.—The objection will be overruled.

A. My recollection is that some of this freight was delivered to the wharf after they received this notice from the Ford Co. to hold it up, and Mr.

(Testimony of Harvey E. Moore.)

Hardy and Mr. Renz were very much agitated over it.

Mr. McCUTCHEN.—I ask that that be stricken out.

The COURT.—Let it go out.

Mr. HENGSTLER.—Q. But they told you that the Southern Pacific Company wanted those packages back, did they?

A. They did.

Q. What did you do after you had that conversation with Mr. Hardy and Mr. Renz?

A. Returned to our office and reported the matter to Mr. Carter.

Mr. HENGSTLER.—That is all.

Cross-examination.

Mr. McCUTCHEN.—Q. Am I correct in my recollection of your testimony of the other day, that it was to the effect that after your return from the East you had very little to do with this [268] transaction, and that it was conducted by others?

A. It was some time after I returned from the East; I don't remember just when I got out of it.

Mr. HENGSTLER.—I don't think he testified to that.

Mr. McCUTCHEN.—No further cross-examination.

Testimony of G. H. Carter, for Libelant (Recalled).

G. H. CARTER, recalled for the libelant.

Mr. HENGSTLER.—Q. Mr. Carter, you heard what Mr. Moore testified just now. Will you kindly

(Testimony of G. H. Carter.)

tell the Court what the report was which you received from Mr. Moore after his interview with the Southern Pacific Co.?

Mr. McCUTCHEN.—I object to that as irrelevant and immaterial. Mr. Moore says that he gave him that information.

The COURT.—The objection will be overruled.

A. Mr. Moore reported that he had had this telephone from the Southern Pacific Office, and had been there, and had called and had learned that this cargo then on the dock had been delivered by them by mistake, and they wanted it returned; this in view of the fact that they had received instructions from the shippers not to deliver the cargo.

Q. Did you, or W. R. Grace & Co., at any time thereafter receive any notice from the Ford Motor Co., or anybody acting for the Ford Motor Co., advising you that these cars were now available for shipment on the "Cacicue"? A. No.

Mr. HENGSTLER.—That is all.

Cross-examination.

Mr. McCUTCHEN.—Q. You did not comply with any request of the Southern Pacific Company on that subject, if any such was made to you?

A. No, we did not. [269]

Q. But you proceeded two days after that to foreclose a maritime lien upon those packages, didn't you? A. Yes.

Mr. McCUTCHEN.—That is all.

Mr. HENGSTLER.—The libelant rests.

The COURT.—I don't know that it is quite clear to the Court that it can be ascertained from the case of the libelant how much they are entitled to, if entitled to anything, as the matter stands now; I don't know how much freight they took, or at what rate.

Mr. HENGSTLER.—I took it for granted, your Honor, that the usual rule of this court would be followed, that the damages would be ascertained by a reference.

The COURT.—That can be done. I thought, though, if you had a memorandum, as suggested by counsel, as to what freight was carried in this space, and what was received for it, that might obviate the necessity of a reference. You can pursue the other course, if you desire.

Mr. McCUTCHEN.—I think that would be very simple, and the Court could dispose of the whole matter. That was the reason I made that suggestion.

The COURT.—There was some suggestion of counsel that you prepare a memorandum and submit it to him, and that they could probably agree on the figures.

Mr. HENGSTLER.—If your Honor prefers that we do so, and counsel desires it, we will prepare that memorandum.

Mr. McCUTCHEN.—By the way, I would like to get one thing clear while we are on that subject. The prayer is for a judgment of $319,000, is it not?

Mr. HENGSTLER.—I have forgotten what the amount of it is; it is mentioned in the libel. [270]

(Testimony of L. C. Davis.)

Mr. McCUTCHEN.—The amount due, and which would have been payable on the 6200 tons of freight at $47.50 a ton would have been $294,500. I would like to know from counsel how they make up that difference.

Mr. HENGSTLER.—I don't know if that is material at the present time. We afterwards reduced the amount of the bond, when we could not ascertain at that time what the amount of the damage was, except roughly. We afterwards reduced the amount of the bond very considerably, when we found that the amount would be less.

Mr. McCUTCHEN.—Was there not in that $319,000 quite a considerable sum for demurrage?

Mr. HENGSTLER.—I could not say that now without looking up the records and consulting with Mr. Carter. I think it was a very rough estimate of what the damages might amount to. But I have relied upon the usual practice of the Court, your Honor.

The COURT.—That is all right, I have no objection.

Testimony of L. C. Davis, for Respondent.

L. C. DAVIS, called for the respondent, sworn.

Mr. McCUTCHEN.—I might say, your Honor, I don't think, in view of the developments that have already been had, that there is any necessity or that any purpose would be served by the making of an opening statement by us.

Q. Where do you reside? A. In Oakland.

(Testimony of L. C. Davis.)

Q. What is your business? A. Exporting.

Q. With what house are you associated?

A. The General Motors Export Co.

Q. How long have you been associated with that corporation? [271] A. A little over a year.

Q. Prior to that time, what was your occupation or business?

A. I was traffic manager for the Chevrolet Motor Co., of Oakland, California.

Q. For what length of time, approximately?

A. Three years.

Q. And prior to that?

A. I was head of the traffic department of the Ford Motor Co.

Q. In San Francisco?

A. In San Francisco; yes.

Q. Were you in that department, that is to say, the traffic department of the Ford Motor Co. in San Francisco during the whole of the month of February, 1916, and from that time and including the whole of the month of July, 1916? A. I was.

Q. But you have not been associated or connected with the Ford Motor Co. since when?

A. October 1, 1916.

Q. October 1, 1916? A. Yes.

Q. You have been in the courtroom here a good part of the time while the case has been going on?

A. Yes.

Q. Are you the Mr. Davis referred to in the correspondence that has been read here?

A. I believe I am.

(Testimony of L. C. Davis.)

Q. Did you, during the month of February, 1916, meet Mr. Moore or Mr. Carter, of Grace & Co.?

A. Yes.

Q. Just state to the Court in your own way when you met those gentlemen, or either of them, and what your conversations with them were; I speak now of the month of February.

A. I don't remember just what date it was in February that I first met Mr. Moore, of the Grace Company, but at that time I was looking for space for automobiles to Australia, and knowing, of course, that Grace & Co. were steamship owners, and the fact that I had seen numerous other steamship owners in the city, and with the assistance of various railroad officials, and particularly [272] Mr. Meyers, I was taken by him to Mr. Moore's office, and there I met Mr. Moore.

Q. What did you tell Mr. Moore you wanted at that time?

A. I don't remember the exact conversation.

Q. Well, in substance; I am not asking you for the identical language that you used.

A. That I was looking for some space for automobiles for Australia for June of that year. I had secured space in other companies for previous months, and it now developed that I had to have some space for June.

Q. Did you tell him for whom you wished the space? A. I did.

Q. For whom did you tell him?

A. For the Ford Motor Co., of Canada.

(Testimony of L. C. Davis.)

Q. Well, at that time, or at any other time subsequent to that, did you show him any communication, that is to say, letters or telegrams, from the Ford Motor Co. of Canada?

A. I had a telegram from the Ford Motor Co. of Canada, in which they advised they wanted, if I remember correctly, some odd 6000 tons for June, and I showed that telegram to Mr. Moore.

Q. Well, what happened at that time, if anything?

A. Well, Mr. Moore could not tell me definitely at that time anything about whether he could favor me or not for those 6200 tons for June sailing, but that we would have to let it go until they could figure out their various ships.

Mr. HENGSTLER.—Q. Did you say for June sailing?

A. Yes. As I recall, there was a map on Mr. Moore's wall, in his office, which had all the ships on it, of their company, and the location of each, and on this map these ships were moved from day to day, scheduled, more for his information, so that he could presumably tell where the ships would be or destined. But there was nothing definite, as I remember, arranged [273] upon that day, that first meeting.

Mr. McCUTCHEN.—Q. Did you go to the office after that? A. I did.

Q. Did you have a talk with Mr. Moore upon that second call?

(Testimony of L. C. Davis.)

A. Well, I talked with Mr. Moore about it every time I went there.

Q. Well, did you get any information from Mr. Moore then as to whether Grace & Co. would be able to furnish you space for the purpose for which you were seeking it? A. Yes.

Q. What was that information, what did he say to you, in substance?

A. We were looking over the map, and it seemed that the "Cacicue" was about the only boat that we could figure on which would arrive here for June sailing. As I recall, she was then on her way from the East Coast to this port, and then for Vladivostok, and her round trip would bring her back into this port about June.

Q. Do you remember whether the date in June was mentioned, or any date in June was mentioned?

A. Well, there was something said about a date, but I cannot recall what date it was.

Q. There have been offered here, Mr. Davis, some letters and telegrams sent by you to the Ford Motor Co. of Canada, in one of which the date June 24th is mentioned, and in another of which the date June 14; while I do not attempt to state it with accuracy, at least one of those telegrams was in answer to a telegram from the Ford Motor Co. of Canada, as to the date of sailing. With those telegrams and letters in mind, can you give us any impression as to the information given to you by Mr. Moore regarding the date when the

(Testimony of L. C. Davis.)

boat or ship would probably sail from San Francisco on her June voyage?

A. As I recall, it was necessary for the Canada factory to know the dates of sailing, the name of the vessel, the port [274] of call, and that sort of thing, and it seems to me, if I remember, I was told that it would sail somewhere around the 24th of June, or around the 14th—or the 24th, I should say; but I don't remember exactly that conversation.

Q. Can you state whether or not it was pursuant to that information you received from Mr. Moore, or from the office of Grace & Co. and Moore, that you made these communications to the Ford Motor Co. of Canada? A. Yes.

Q. When you had your various conversations with Mr. Moore, or any other representative of Grace & Co., did you exhibit to him the communications which you had had from the Ford Motor Co. of Canada? A. I did.

Q. Do you remember whether at any time Mr. Moore asked you what your authority to engage that space was?

A. I believe that that question was asked me.

Q. Now, if you have any recollection upon the subject, can you state what you did in answer to that question?

A. I could only act on authority from the Ford Motor Co., of Canada.

Q. Did you so tell Mr. Moore? A. Yes.

Q. You have examined the file of correspondence

(Testimony of L. C. Davis.)

passing between you and the Ford Motor Co. of Canada with reference to this transaction, haven't you, Mr. Davis? A. Yes.

Q. Do you recall whether or not the telegram which I show you, and which is dated February 25, was received by you from the Ford Motor Co. of Canada? A. Yes.

Q. This is one of the telegrams read by counsel on the other side. You do remember that that telegram was received by you? A. Yes. [275]

Q. Will you state whether or not you made any reply to it? A. Yes.

Q. What is the date of your reply?

A. February 27th.

Q. That has also been read by counsel for libelant. Have you any recollection as to whether you exhibited to Mr. Moore the telegram of February 25 from the Ford Motor Co. of Canada to you?

A. Yes.

Q. To refresh your recollection, your Honor, that telegram reads: "Accept Grace offer sixty two hundred tons. Confirm advising names and dates of sailing." When did you show to Mr. Moore this telegram of February 25 with reference to the time when you signed the contract?

A. I showed Mr. Moore that the day I received it.

Q. The contract, or what is claimed to be the contract, is dated February 25. I don't think there is any impropriety, your Honor, in my putting a leading question to the witness here. Was it at that time when you signed the contract which bears

(Testimony of L. C. Davis.)

date February 25 that you showed Mr. Moore this telegram?

A. I must have shown it to him that day.

Mr. HENGSTLER.—I would not be too leading in this, Mr. McCutchen.

Mr. McCUTCHEN.—Here is a transaction that took place four years before; this witness no longer has any relation to the business in which it arose, and I really think that I was not guilty of any impropriety in putting that question.

The COURT.—What is the answer.

(Answer read by the reporter.)

Mr. McCUTCHEN.—Q. That was your authority to sign the contract, was it not, Mr. Davis?

A. Yes.

Q. Can you tell us whether you signed that contract before you received this telegram?

A. I did not. [276]

Q. The telegram of February 27 reads, in part, and that is the one which the witness says was sent in reply to that of the 25th, asking for the sailing date: "Have signed with Grace American Steamer 'Cacicue' about June 24." That is not all the telegram, but it is the first line. Now, can you state whether the information contained in this telegram of the 27th of February, reading, "Have signed with Grace American Steamer 'Cacicue' about June 24," was given to you by Mr. Moore?

A. As Mr. Moore was the only man that I was talking to in Grace & Co., it must have been.

Q. Did you or not convey the information to the

(Testimony of L. C. Davis.)

Ford Motor Co. of Canada, just as Mr. Moore had given it to you? A. I did.

Q. There have been read here this morning—possibly some of it was read yesterday—some letters and telegrams, one or both, written by you to the Ford Motor Co. of Canada, in which you gave sailing dates. Will you state whether the information conveyed in those communications was given to you by Mr. Moore or by someone else in the office of Grace & Co.?

A. I don't remember whether it was Mr. Moore that gave me the information.

The COURT.—I think your question is confusing. I think it may be. The witness is trying to distinguish whether the information came from Mr. Moore or somebody else in Grace & Co. I thought you wanted to know if it came from anybody in Grace & Co.

Mr. McCUTCHEN.—Yes.

Q. Did the information which you conveyed in these letters come from someone in the office of Grace & Co.? A. Yes. [277]

Q. Would it be fair to say that you knew nothing about the date on which that ship would sail except as you got it from Grace & Co.?

A. Yes, it would be fair.

Q. Did you visit the wharf at which the "Caicue" landed before she actually landed there, or on the day that she arrived there?

A. I don't remember what day it was, but I did visit it.

(Testimony of L. C. Davis.)

Q. Did you visit the wharf subsequent to her arrival there? A. Yes.

Q. What was its condition with reference to freight being piled upon it? A. It was congested.

Q. Very badly congested? A. Yes.

Q. With cargo that had been taken out of the "Cacicue"?

A. I think it was taken out of the "Cacicue," but I am not positive.

The COURT.—Of course, that would not imply a very early visit.

Mr. McCUTCHEN.—No.

Q. Were you there on the 27th, if you remember, of June? A. I could not say positively.

Q. Were you there on the 28th?

A. I was there a very short time after the arrival of the ship.

Q. Were you there prior to the 1st of July?

A. Yes.

Q. You are quite positive of that? A. Yes.

Q. When you went there prior to the 1st of July, what was the condition of the wharf, with reference to freight being piled upon it?

A. It was congested, piled very high in some places.

Q. Would you call it a very decided congestion of freight? A. I would.

Mr. HENGSTLER.—I object to that, if your Honor please, "a very decided congestion of freight." That is a matter of opinion [278] and judgment.

(Testimony of L. C. Davis.)

The COURT.—Let it stand.

Mr. HENGSTLER.—We are willing to admit there was freight there, if your Honor please.

Mr. McCUTCHEN.—Take the witness.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Davis, do you remember that you were in my office about a week ago? A. I do.

Q. Who was present at the time, Mr. Davis?

A. Mr. Moore and Mr. Florentine, and yourself.

Q. Do you remember that you told me on that occasion that these events having happened so long ago you did not have any clear recollection of any of them?

A. Well, I don't know as I remember those exact words, or not.

Q. Well, what did you say with reference to that?

A. I don't recall.

"Q. Mr. Davis, do you remember that you told me in the presence of Mr. Moore and Mr. Florentine on that occasion that there was one feature that you remembered distinctly, namely, that no exact time for the arrival of the 'Cacicue' was intended to be stipulated, on the ground that it was impossible, so long ahead, for any steamship man to fix any time?

A. For the arrival of the steamer?

Q. Yes. A. I believe I did."

Q. You said that you did not intend to make any contract with W. R. Grace & Co. at the time for the arrival of that steamer or the loading of that

(Testimony of L. C. Davis.)

steamer on any exact date, by reason of the fact that that would be impossible to do so long ahead. You remember that you said that, don't you?

A. I don't recall that, Mr. Hengstler.

Q. Don't you remember that you said that no steamship man could [279] possibly foretell four months ahead the time of arrival of a steamer at any particular time, and that for that reason it was not intended to make any contract for her arrival on any particular date?

A. I don't remember of making such a broad statement as that, about being a steamship man.

Q. What did you say with reference to that?

A. I am very sorry, but I cannot recall.

Q. Do you remember that you, yourself, suggested that since you knew that two voyages would intervene between the 25th of February and the expected arrival of the "Cacicue," that a great many things might happen to steamers on voyages, and, therefore, it would have been impossible to state when that steamer would arrive in San Francisco, that it could only be approximate?

A. I remember something about stating that there might be many things happen to a steamer while it was in transit.

Q. And did you not say that you realized that when you made this contract?

A. I do not remember stating that.

Q. You do not remember that? A. No.

Q. Try and think about that, Mr. Davis. Try and tell the Court what you said on that point.

(Testimony of L. C. Davis.)

A. I couldn't remember.

Q. Didn't you say that the time of the arrival of that steamer, or of the loading date, or of the sailing date, was not an essential part of this contract?

A. I don't remember making that statement.

Q. Mr. Davis, you know the difference between a loading date and a sailing date, do you not?

A. Why, yes.

Q. Those are two different things, are they not?

A. As much as I know about the steamship business, I would say they were.

Mr. HENGSTLER.—That is all [280]

Redirect Examination.

Mr. McCUTCHEN.—Q. Was it before or after your visit to Mr. Hengstler's office that you refreshed your recollection by the examination of this correspondence? A. It was before.

Q. Had you read the correspondence before you went to Mr. Hengstler's office?

A. I had read some of it.

Q. Did you read all of the correspondence after you went to Mr. Hengstler's office? A. No.

Q. Did you go over any part of the correspondence after being at Mr. Hengstler's office?

A. Yes.

Q. Had your attention been called particularly to these letters and telegrams mentioning these dates before you went to Mr. Hengstler's office?

A. Yes.

(Testimony of L. C. Davis.)

Recross-examination.

Mr. HENGSTLER.—Q. Only one question I would like to ask Mr. Davis that I forgot: Mr. Davis, what was the practice of your office—how long were you in the office of the Ford Motor Co. of Canada?

A. I was never in the office of the Ford Motor Company of Canada.

Q. Ford Motor Co. of San Francisco; I beg your pardon. A. Two years.

Q. Two years? A. Yes.

Q. Do you know what the custom or practice of your office was with reference to destroying letters and documents that had accumulated in your office? Did you become acquainted with that during your connection with the office?

A. The correspondence was so tremendous that it would be impossible to retain any correspondence that had served its purpose any length of time, as I recall it.

Q. And some of the correspondence in this case was destroyed in [281] your office, was it not?

Mr. McCUTCHEN.—One moment. If he knows.

Mr. HENGSTLER.—Q. Tell us whether some of the correspondence was destroyed in your office, within your knowledge?

A. I have no recollection or knowledge.

Q. You did not give any orders to destroy any of it, did you, yourself? A. No.

Mr. HENGSTLER.—That is all.

Mr. WILLIAMSON.—Do you want any more

(Testimony of L. C. Davis.)

correspondence besides what you have got?

Mr. McCUTCHEN.—You undoubtedly have the beginning of that correspondence. It begins with the 25th of February, the day on which the contract was signed. It is hardly conceivable that there could have been correspondence before that date.

Mr. HENGSTLER.—I can easily see that there might have been correspondence before February.

The COURT.—Anything further with this witness?

Mr. McCUTCHEN.—Nothing further.

Mr. WILLIAMSON.—As soon as we could proceed at all, even after you had withdrawn your notice to produce certain correspondence, I telephoned to the manager and asked him to send it down, and within five or ten minutes he said it was all destroyed. I think if there is any question about it we had better bring Mr. Bullwinkel in here and let him testify as to it; if you are not satisfied with the statement I would rather that we brought him in.

Mr. McCUTCHEN.—Here is a file that undoubtedly was prepared for counsel in this case a long time ago, and counsel for the libelant has had the benefit of the examination of that file, and I do not think that that statement ought to be made. [282]

The COURT.—Let us assume that there is a general denial put in and proceed with the taking

(Testimony of W. E. Heppell.)

of the testimony. Let us cover anything that is suggested by counsel that his denial goes to. Call the next witness.

Testimony of W. E. Heppell, for Respondent.

W. E. HEPPELL, called for the respondent, sworn.

Mr. GRIFFITHS.—Q. Will you state your business, please, Captain?

A. I am surveyor to Johnson & Higgins.

Q. Are you a master mariner? A. Yes.

Q. What papers do you hold?

A. I hold American and British masters' license, all oceans.

Q. How long were you a master?

A. Twelve years.

Q. In what waters have you sailed as master?

A. Mostly Oriental waters.

Q. What did you say you were doing at present?

A. I am surveyor for Johnson & Higgins.

Q. How long have you been surveying in that capacity? A. Since the 1st of October, 1920.

Q. What were you doing immediately prior to that, Captain?

A. With the Pacific Mail Steamship Co.

Q. Here in San Francisco? A. Yes.

The COURT.—Q. As surveyor?

A. No, sir, I was preparing to go to the Orient as an agent.

Mr. GRIFFITHS.—Q. Just what were you doing with the Pacific Mail Steamship Company while

(Testimony of W. E. Heppell.)

in that preparation, in what duties were you engaged?

A. I had no particular duties, I was going through the whole organization of the Pacific Mail here, to familiarize myself with the conditions, preparatory to taking up an agency in the Orient. [283]

Q. Did you have occasion to be on their docks?

A. Yes.

Q. And to observe their incoming vessels?

A. I was on the docks almost every day.

Q. Do you know the steamship "Cacicue," that we have been talking about in this trial?

A. Yes.

Q. Have you seen her?

A. I saw her in the Orient, at Shanghai.

Q. Have you had occasion to examine the blue-print of the "Cacicue," which Doctor Hengstler handed me during the course of the trial, so as to fully familiarize yourself with her? A. Yes.

Q. Of course, in your experience as master and officer of vessels, you had occasion to discharge cargoes? A. Yes.

Q. Can you give us an estimate, based on your experience as master, and as a surveyor here, and on your experience with the Pacific Mail, and upon your familiarity and your knowledge of the "Cacicue," and of this blue-print, as to how long it would probably take, under the best of conditions—I mean in the absence of strikes, etc.—to discharge an inward cargo from the "Cacicue,"

(Testimony of W. E. Heppell.)

an inward mixed cargo of Chinese goods of 7900 tons?

A. You mean a cargo similar to the stowage plan you showed me?

Q. I mean the exact cargo shown on the inward stowage plan of the "Cacicue," which is attached to the libelant's answers to the interrogatories, and which you have been over?

A. Is that measurement tons?

Q. Both measurement and dead weight, they are.

A. Well, under the very best conditions, working continuously in a ship like the "Cacicue," I should say about 72 hours' continuous working.

Q. By "continuous working," do you mean day and night? A. Day and night, and meal hours.

Q. The full 24 hours?

A. Yes, having relieving gangs at meal [284] hours.

Q. Do you know anything of strike conditions in San Francisco?

A. Yes, I was through the last strike.

Q. When you were in the service of the Pacific Mail, do you mean? A. Yes, sir.

Q. Can you give us an estimate of how much that time would probably be prolonged by a strike affecting the company which was discharging the vessel?

A. When the regular longshoremen went out it was necessary to bring in a crowd or a crew of inexperienced men, and although they had done laboring work of some kind or other, they had not

(Testimony of W. E. Heppell.)

actually handled the merchandise coming into this port, nor were they familiar with the stowage of freight, either stacking it on the dock or in the ship, and I do not believe they would get more than 30 per cent efficiency from a green crew, to begin with; of course, they would improve as they went on.

Mr. HENGSTLER.—Q. May I ask whether the captain's answer was with reference to this strike that existed in June, 1916?

A. No, sir. We have had strikes since then.

Mr. GRIFFITHS.—It was not particularly with reference to that very strike, but he has seen strike conditions in San Francisco.

Mr. HENGSTLER.—Q. You are speaking in a general way about strikes, aren't you?

A. Yes, in a general way.

Mr. GRIFFITHS.—Q. I want you to state it conservatively, Captain. You gave an estimate of 72 hours under the best conditions. What do you think would be the time under strike conditions, putting it within a safe margin?

A. I don't think you could possibly discharge her under eight days' continuous work.

Q. Captain, would you as master take the "Cacicue" on a voyage from [285] San Francisco to Australia if she was leaking in the forepeak, having cracks 20 inches long—vertical cracks—in the sixth strake below the sheer strake, at the stem?

A. No, sir, I don't think I would. First of all, I don't think I would be allowed to take her, I

(Testimony of W. E. Heppell.)

think that the classification societies would not allow her to leave.

Q. Would you take her if she were classed in Lloyd's, without first having the consent of Lloyd's surveyor?

A. No, sir; I would not; and, besides that, a vessel arriving at the port of San Francisco with a leak in the forepeak, the matter would have to be reported to the local inspectors of hulls and boilers, and they would have some say.

Q. If you ascertained, with respect to the bushing of the vessel, that some of the blocks were missing, and some hammered, and some out of place, would you consider her seaworthy to go out, without having that condition rectified?

A. No, sir, I would not.

Q. And referring, now, to No. 2 double bottom tank, if the riveting and the caulking were loose on the gusset plates where they join the tank tops, would you consider her seaworthy to go out unless that condition were repaired, if she were to carry oil or water in those tanks?

A. I have read the surveyor's report on that, which was made in Hongkong—

Q. You mean this particular report?

A. Yes, this particular report on the "Cacique," and he distinctly states that the repairs are to be made at a later date. He naturally referred to her first port. The fact of a ship not being allowed to carry either water ballast or fuel oil in her double bottom tank would indicate that there was some-

(Testimony of W. E. Heppell.)

thing wrong, that the ship was not absolutely seaworthy. [286]

Q. Do you happen to know Mr. Lambert, Lloyd's surveyor at Hongkong, who made this report?

A. Yes, I know him.

Cross-examination.

Mr. HENGSTLER.—Q. Captain, did you read that report of the Hongkong surveyor?

A. Yes.

Q. Did you notice that the surveyor there recognized that the defects in the vessel should be repaired later? A. At a later date, yes.

Q. That is what he recommended? A. Yes.

Q. Would you not say that that indicated that the defects were not so great but that they could have been repaired after the vessel came back to the Orient, after having arrived in San Francisco?

A. The vessel was sailing under a seaworthy certificate, and the fact of the vessel sailing under a seaworthy certificate—a temporary seaworthy certificate from Hongkong, was enough to have the repairs done as soon as possible.

Q. As soon as possible?

A. As soon as possible.

Q. But if the Hongkong surveyor had considered it necessary that she should be repaired in San Francisco, would he not have said so in his certificate? A. Not necessarily.

Redirect Examination.

Mr. GRIFFITHS.—Q. That question of a postponement of repairs refers, does it not, only to the

(Testimony of W. E. Heppell.)

one item of the gusset plates on the No. 2 deep tanks, as to which she was allowed to come to San Francisco under the temporary certificate provided that no water or oil be carried in those tanks?

A. Yes.

Q. The other small items were taken care of at Hong Kong, were they not, according to that report? A. Yes.

Q. And the other items you referred to, the bushing and the leaks [287] in the forepeak, are defects that occurred on the voyage to San Francisco?

A. On the voyage from Hongkong to San Francisco.

Q. That is according to the report you have seen?

A. Yes. These repairs are more or less governed by the classification society surveyor, coupled with the local inspectors of the port; that is, if the owners of the vessel wish to keep her in classification; of course, if they wish to withdraw her from classification, they can ignore the repairs altogether, as long as the ship is seaworthy.

Mr. HENGSTLER.—Mr. McCutchen, I think it appears in the evidence, but I am not certain about it, it is the fact, is it not, that some of the defects and damages were not discovered until after the vessel was in drydock?

Mr. McCUTCHEN.—Yes, I think probably that is so; for instance, these cracks in the plates. I suppose those plates were under water at the time the vessel was loaded. But the leak must have been

(Testimony of J. G. Ludlow.)

known. As Captain Blackett said, someone reported to him there was a leak.

Mr. GRIFFITHS.—I think that is all perfectly clear, Mr. Hengstler. The leak in the gusset plates in the No. 2 double bottom tank was brought to Mr. Blackett's attention by the survey report which came to him from Hongkong, and which he refers to in his own report. And he sent the vessel to drydock because she was leaking in the forepeak, and after she got in drydock he found these other matters.

Testimony of J. G. Ludlow, for Respondent.

J. G. LUDLOW, called for the respondent, sworn.

Mr. GRIFFITHS.—Q. Will you kindly state your business, [288] Captain?

A. Master mariner, marine surveyor.

Q. How long were you going to sea?

A. Since 1899.

Q. And you hold master's papers, do you?

A. I do.

Q. Were you ever in the trans-Pacific service?

A. Yes.

Q. With what concern? A. Pacific Mail.

Q. In what capacity?

A. As everything from quartermaster to chief officer.

Q. For how long?

A. For about six and one-half years.

Q. Did the duties of chief officer have to do par-

(Testimony of J. G. Ludlow.)

ticularly with the discharging and loading of cargo?

A. Yes.

Q. What is your present business or connection, Captain?

A. Marine surveyor, associated with Pillsbury & Curtis, of this city.

Q. Immediately prior to that, what was your business?

A. Port captain of the Pacific Steamship Company.

Q. In San Francisco?

A. In San Francisco, and prior to that in Seattle.

Q. What are the duties of a port captain in a general way?

A. General port superintendence duties.

Q. As port captain, did you have occasion to observe the incoming of vessels of the company and the discharge of the cargoes? A. Yes.

Q. Were you port captain of the Pacific Steamship Company during the stevedores' strike in San Francisco in the summer of 1916?

A. I was port captain of the Pacific Steamship Company, with headquarters at Seattle at that time, and I was called to San Francisco to supervise that particular strike.

Q. You were called here on account of the strike?

A. On account of the strike.

Q. Do you know the "Cacique"?

A. I have seen the "Cacique." [289]

Q. Have you examined the blue-print of her which Doctor Hengstler has handed us here?

(Testimony of J. G. Ludlow.)

A. I have.

Q. Can you give us, based on your experience, an estimate as to how long it would take under normal conditions, and if you were endeavoring to discharge as fast as you possibly could, to unload from the "Cacique" a cargo of 7,900 tons, miscellaneous cargo from the Orient?

A. Basing my opinion on the capacity of the hatch of the greatest capacity on that vessel, I would say that it would take between 70 and 80 hours continuous working.

Q. You make some reference to a larger hatch; is one of the hatches unusually large on the "Cacique"?

A. It appears so by that blue-print of the vessel.

Q. And I take it you judge of the speed with which you could unload the entire vessel by the rate at which the largest hatch would be discharged; is that what you mean?

A. The speed of a fleet of vessels is the speed of the slowest vessel in that fleet, and, similarly, the speed of discharging a vessel's cargo, the best speed, is the best speed that you can discharge the largest hatch of that vessel.

Q. What would have been, in your judgment, stating it conservatively and on the safe side, the effect of a strike as to the prolongation of that 73 hours—or 70 to 80 hours, as you state?

A. It would all depend upon the length of time the green men had had opportunity to learn their new business. I understand that this "Cacique"

(Testimony of J. G. Ludlow.)

was in during the latter part of June, and that the strike commenced about the 1st of June, therefore, the men would have had about a month, and they would have, in my opinion, gained about 40 per cent of normal efficiency at that time; it would, therefore, take, I should judge, about 180 consecutive hours to work the 2,940 tons which the blue-print [290] shows is the capacity of the No. 2 hatch.

Q. How long, then, would you say it would have taken to discharge the entire cargo, 7,900 tons, under strike conditions?

A. It would take the length of time that it would take to discharge the longest hatch working consecutively.

Q. Night and day? A. Night and day.

Q. Would you consider it prudent to take the "Cacique" to sea on a voyage from San Francisco to Australia with two cracks in her sheer plating near the stem, in the sixth strake below the sheer strake, bearing in mind she was to be fully loaded so that she would be deep in the water?

A. I would not, no.

Q. Would you take her to sea, as master of the vessel, without the approval of Lloyd's surveyor to the registry, if she were entered in Lloyd's?

A. As master of the vessel I would take her to sea if my owners instructed me to do so—under protest, possibly. I would consider that the vessel was not entitled to full confidence, that she was not in seaworthy condition at that time.

Q. Referring now to her bushings for the tail

(Testimony of J. G. Ludlow.)

shaft, several of the blocks were hammered, and others loose, and the guard ring broken; would you consider it prudent to take her to sea without having those conditions repaired?

A. No, I would not.

Q. And suppose the riveting and caulking on the gusset plates of the No. 2 bottom tank to be loose, would you consider it prudent to take her to sea if you were to have oil or water in those tanks, and cargo in the vessel? A. No, I would not.

Cross-examination.

Mr. HENGSTLER.—Q. Captain Ludlow, assuming that the "Cacique" went out of this port with a cargo of 6,000 tons, being capable of carrying a cargo of 9,000 tons, so that she was only two-thirds [291] in the water, would that qualify your answer with reference to ability to take her on her voyage safely and repair her at the end of the voyage?

A. That is a matter that should be left with the classification society surveyor. My personal opinion is that if a ship is in a port where there is a drydock and those defects are known to exist in the hull also, she ought to be repaired.

Q. I am asking you, however, with reference to a safe voyage; could the voyage be made safely under those conditions if she is only two-thirds loaded, if she carries measurement cargo that is of comparatively little weight?

A. That is very doubtful, whether she could make

(Testimony of J. G. Ludlow.)

the voyage safely under all conditions that might exist during the voyage.

Q. Your answers, however, were predicated, were they not, upon the assumption that she would be deeply laden, that she would carry her full cargo capacity? A. No.

Mr. GRIFFITHS.—Doctor Hengstler, let me direct your attention to interrogatory 50: "How much and what cargo loaded on said steamer 'Cacique' for said outward voyage was contracted for by libelant prior to June 26, 1916?

A. 6,200 tons of respondent's autos, 2358.5 tons for outsiders, which would make a total aggregate of 8500 odd."

Mr. HENGSTLER.—But that is measurement; I am speaking of dead weight.

The COURT.—Personally, I think we are shooting at the moon. Mr. Carter testified he would not have sent the ship out without the consent of Lloyd's; Lloyd's representative said she could not go out until these repairs were made. There you are.

Mr. HENGSTLER.—That is all, Captain. [292]

Mr. McCUTCHEN.—Simply for the purpose of completing the correspondence between the libelant and the respondent, and the correspondence between the libelant and the Ford Motor Co. at San Francisco with reference to one phase of this matter, we desire to offer two letters, and, following the practice which has been pursued by the other side, I will read them so that the reporter may extend them

"San Francisco, June 22, 1916.

"Ford Motor Co. of Canada,

"Ford, Ontario.

"Gentlemen:

"Supplementary to our previous advices, we enclose herewith carbon copy of our letter of today's date to Ford Motor Co., San Francisco.

"Yours very truly,

"W. R. GRACE & CO.

"H. E. MOORE,

"Traffic Manager."

And the letter which was enclosed in that letter is dated the same date:

"San Francisco, June 22, 1916.

"Ford Motor Co.,

"21st and Harrison Streets,

"San Francisco, Calif.

"Gentlemen:

"Supplementary to our letter June 6th, advising that steamship 'Cacique' will be ready to load at San Francisco June 27, please note the delivery of 6,200 tons automobiles and parts full quantity of your engagement under contract dated February 25 must commence on that date, June 27, and be completed not later than June 29. Yours very truly,

"W. R. GRACE & CO.,

"H. E. M.,

'Traffic Manager." [293]

There was a letter introduced bearing date June 6, 1916, addressed, I think, to the Ford Motor Co. of Canada, but as to that I am not very clear at this moment, but at any rate on the same date there

was a letter addressed to the Ford Motor Co., San Francisco, by Grace & Co., reading as follows:

"June 6, 1916.

"Ford Motor Co.,

"21st and Harrison Streets,

"San Francisco, Calif.

"Gentlemen:

"We beg to confirm our previous oral advices to you that steamship 'Cacique' will be ready for loading the 6,200 tons of automobiles and parts and packages as per our contract of February 25, 1916, on or about the 27th day of June, 1916. We now understand that shipment is en route to San Francisco, and that you have made all arrangements with the railroads to have same alongside our ship on the 27th instant, ready for loading as fast as ship can receive, which is also in accordance with our contract of February 25.

"Yours very truly,

"W. R. GRACE & CO.

"Traffic Department."

It is my recollection, Doctor Hengstler, that on the original, above the words "Traffic Department," was signed in ink "D. Mann," who is a member of your traffice department.

Mr. HENGSTLER.—Yes, I think that is correct. It was signed by someone in the traffic department.

Mr. GRIFFITHS.—It was signed by Dalton Mann.

Mr. HENGSTLER.—Yes, Dalton Mann.

Mr. McCUTCHEN.—That is our case, your Honor. [294]

Testimony of George Florintine, for Libelant (In Rebuttal).

GEORGE FLORINTINE, called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—Q. What is your business, Mr. Florintine? A. Steamship.

Q. What firm are you connected with?

A. W. R. Grace & Co.

Q. Do you recall meeting me in my office about a week ago, at a meeting at which there were present Mr. Harvey E. Moore and Mr. L. C. Davis?

A. Yes.

Q. Do you remember that at that time I asked Mr. Davis to refresh his memory, and I asked him in reference to different facts in connection with the "Cacique" shipment of 6,200 tons automobiles which were to go to New Zealand and Australia; you remember that, do you not?

A. Very distinctly; yes.

Q. Will you kindly tell the Court what Mr. Davis stated in connection with that transaction, and in connection with the facts, particularly in connection with the contract that was entered into between himself and Mr. Moore relative to the time of the loading of this vessel with the 6,200 tons automobiles?

A. I remember the conversation very distinctly. Mr. Hengstler said to Mr. Davis: "Do you remember the circumstances that first brought you up to Grace & Co. in connection with this shipment?" And Mr. Davis said that he had been out of the Ford Company for so long that his recollection was

(Testimony of George Florintine.)

not clear at all, that when he left the Ford Company he immediately proceeded to forget all that he had to do with the Ford Company. And Mr. Hengstler said that he would allow him to look over the correspondence to refresh his memory. And after reading through the correspondence, and going over it, Mr. Davis' recollection was a little clearer. He said: "Yes, some of those things come back to me now, I remember coming up to Grace & Company's office [295] with Mr. Meyers and discussing the matter with him; Mr. Moore then took us in to Mr. Carter, and Mr. Carter seemed anxious for the business but did not know where he could get a ship, so he said, 'Come in in a few days later.'' And Mr. Davis said that he went back a few days later and went to Mr. Moore's office—

Mr. McCUTCHEN.—If your Honor please, Mr. Davis was not asked anything about this conversation that this witness is narrating now.

Mr. HENGSTLER.—Yes, he was.

Mr. McCUTCHEN.—No, nothing of the kind was called to Mr. Davis' attention.

Mr. HENGSTLER.—I asked Mr. Davis with reference to any agreement that was made between the parties as to the time of loading this vessel, and you, yourself, asked him that, too.

Mr. McCUTCHEN.—You are impeaching Mr. Davis now, as I take it. I think the question asked of him was—at any rate, this is my recollection, "Was there anything said about a particular day

(Testimony of George Florintine.)

on which that vessel would arrive in San Francisco?"

Mr. HENGSTLER.—Q. What did Mr. Davis say with reference to the particular days when the vessel would arrive in San Francisco, or load—well, would arrive in San Francisco?

A. I will have to tell it in my own way.

Mr. McCUTCHEN.—I object to the witness telling it in his own way. This inquiry should be confined to the questions which were asked of Mr. Davis, and which Mr. Davis answered.

A. Well, the question came up about this loading: Mr. Davis was sitting by the window, and he said: "Well, I quite agree with you, there is no steamship man that would—it would be almost [296] impossible for any steamship man to say four months ahead the exact date that a vessel would arrive at any particular port," because he appreciated that there would be a great many conditions which might arise which would prevent a vessel making a port on any certain date, particularly as it had to make these two voyages—at least the voyage to San Francisco and then return before it could meet the date. He said that as he remembered it he was very glad to get the space and that—

Mr. McCUTCHEN.—I object to that. Mr. Davis' attention was not called to that.

A. (Continuing.) Well, I was there, and I know what he said.

Mr. McCUTCHEN.—That is not part of the question.

(Testimony of George Florintine.)

Mr. HENGSTLER.—Q. Go ahead.

Mr. McCUTCHEN.—Does your Honor rule that he may proceed?

The COURT.—The question that was asked Mr. Davis, and to which he returned a rather hesitating reply, had to do with a date. I do not recall the exact form of the question. The exact form of the question that was put to Mr. Davis ought to be put to this witness. Mr. Davis was asked, "Did he not in your office say certain things."

Mr. HENGSTLER.—Mr. Reporter, will you read to this witness the question and answer on that subject of the date of the arrival of that vessel, the question put to Mr. Davis and the answer given by him.

(The record was here read by the reporter as follows:)

"Q. Don't you remember that you said that no steamshipman could possibly foretell four months ahead the time of arrival of a steamer at any particular time, and that for that reason it was not intended to make any contract for any arrival on any particular date? A. I don't remember of making such a broad [297] statement as that, about being a steamship man."

Q. Now, what did Mr. Davis say?

A. As I remember it, he said exactly what was read to me there, that he did not think that any steamshipman would be in a position to definitely fix a date for the arrival of any vessel four months

(Testimony of George Florintine.)

ahead, particularly in view of the voyage the vessel had to make.

The COURT.—Q. And that is all?

A. That is all at that particular moment, yes, sir.

Mr. HENGSTLER.—That is all.

Mr. McCUTCHEN.—No cross-examination.

Mr. HENGSTLER.—That is our case.

The COURT.—Do you want to argue the case?

Mr. HENGSTLER.—Do you want to argue the case orally?

Mr. McCUTCHEN.—We are ready to proceed.

Mr. HENGSTLER.—If your Honor please, I would rather present the argument in briefs. There is so much correspondence in the record now, of which I have but a very superficial examination, that it would be impossible to do it full justice at a first reading. If the other side has no objection, I think the case could only be treated properly by briefing it. But if it is to be argued orally, I would like to have a later date set for the argument.

Mr. McCUTCHEN.—I don't object to that, your Honor, I don't want to crowd counsel into an argument if he is not ready for it, but I do think that this case is one that ought to be argued orally.

The COURT.—Do you mean as to the facts?

Mr. McCUTCHEN.—On the facts, your Honor, yes. [298]

The COURT.—I don't think there is any question as to the facts.

Mr. McCUTCHEN.—Very well, then, as to the law we are ready to present our argument now.

Mr. HENGSTLER.—I can present the law only by referring to some facts with which I became acquainted only to-day.

Mr. McCUTCHEN.—This question was quite thoroughly briefed in many of the phases that are now before the Court on a proceeding that arose, I think, on counsel's motion to strike out portions of the answer.

Mr. HENGSTLER.—That only raised a very small portion of the questions involved in this case. There are other questions involved in the case.

Mr. McCUTCHEN.—There are three principal questions involved in the case, as I understand it: First, did those letters of the 14th and 24th of June amount to a renunciation of the contract; second, and probably more important than any other question, was that renunciation accepted; that divides itself into possibly two or three questions; and the third question is whether or not that ship was ready to go to sea in the month of June, if she was obligated to go during the month of June, or was she ready to take on cargo during the month of June, this cargo spoken of in the contract.

Mr. HENGSTLER.—I will be ready, if your Honor will set the case tomorrow, or at any other date. I will admit that I am not in good condition to argue it at the present time.

The COURT.—I might hear you Friday, if I get through with the case that I have for trial to-

morrow, in view of the fact that the other case has gone over that was to follow it. But that will be contingent upon finishing the case I have set for [299] trial to-morrow.

Mr. McCUTCHEN.—How would this suggestion do: Are you willing to be limited, Doctor, to an hour on each side for the oral argument?

Mr. HENGSTLER.—Will your Honor accept a memorandum of authorities, besides hearing oral argument?

The COURT.—Yes, I want as much light, perhaps, as anybody, and need it more.

Mr. HENGSTLER.—In that case, I will agree to an hour on each side.

Mr. McCUTCHEN.—Or, perhaps you would rather do this: You suggested setting it down for Friday afternoon. Suppose we meet at two o'clock, and if his Honor will sit until half-past four on Friday, each side can have an hour and a quarter. I think that ought to be quite ample time.

Mr. HENGSTLER.—Yes, that will be satisfactory.

The COURT.—All right, we will do that.

(Thereupon the cause was continued until Friday, November 19, 1920, at two o'clock P. M., for argument.)

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [300]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Hon. MAURICE T. DOOLING, Judge.

VOLUME 4.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation,

Respondent.

Monday, November 22, 1920.

COUNSEL APPEARING:

For Libelant: L. T. HENGSTLER, Esq.

For Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. McCUTCHEN.—If your Honor please, before the argument proceeds, since the adjournment of this case, or, rather, after the adjournment of the case Mr. Williamson found among his files, and in the files of a matter of which he had charge for the Ford Company, other than this Grace controversy, a telegram to which the telegram of Davis of the 24th is an answer. We would like to introduce that telegram in order to make the file com-

plete. Mr. Williamson sent Dr. Hengstler a copy of it.

Mr. HENGSTLER.—He handed me a copy of it.

Mr. McCUTCHEN.—Have you any objection, Doctor? [301]

Mr. HENGSTLER.—I don't care to have anything to say about that, at all. You can do whatever you please in reference to that.

Mr. McCUTCHEN.—Very well. We offer it in evidence. It is as follows:

"Walkerville, Ontario, February 23.

"Ford Motor Company,

"2905 21st Street,

"San Francisco, California.

"Have arranged with Illinois Central representing Hind Rolph for Union Steamship for four thousand tons and with Southern Pacific it is likely for twenty-two hundred tons April and May; would like another four thousand tons May and June sailing; offer $47.50.

"FORD SALES DEPARTMENT."

Now, if your Honor please, I do not know to what extent the files of this court are deemed to be evidence for the purpose of a trial, if at all, but in order that there may be no question of that kind, there is part of the record in this case which we desire to offer in evidence.

The COURT.—You mean part of this record?

Mr. McCUTCHEN.—Yes, your Honor, part of the record in this case. Mr. Griffiths will enumerate them.

Mr. GRIFFITHS.—They are simply the documents connected with the issuance of process, that is to say, the praecipe, the monition, the citation, the marshal's return.

The COURT.—All right.

Mr. GRIFFITHS.—I will enumerate them and the reporter may copy them into the record, so that these papers may be returned to the clerk.

The praecipe to the clerk of the court, filed June 27, 1916; [302] the monition *in rem,* together with the marshal's return thereon, and together also with the affidavit of publication annexed thereto. Those constitute one document.

The citation against the respondent, the Ford Motor Company of Canada, Limited, a corporation, and the marshal's return on that; the citation and the order for foreign attachment; the marshal's return annexed thereto, and the return of the garnishee, Southern Pacific Company, also attached thereto. Those constitute one document.

And I suppose it will be stipulated, Doctor Hengstler, that the proclamation was read in the regular and due course.

Mr. HENGSTLER.—Anything that is in the record of the case, or the minutes, I suppose, will be all right.

Mr. GRIFFITHS.—That is all.

(The documents enumerated by Mr. Griffiths read as follows:)

"UNITED STATES OF AMERICA.

"District Court of the United States, Northern District of California.

"CLERK'S OFFICE.

"No. 16,058.

"W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation and CERTAIN AUTOMOBILES, etc.,
Respondents.

PRAECIPE.

"To the Clerk of Said Court:

"Sir: Please issue Monition and Citation in the above *rem* and *personam* proceeding.

"ANDROS & HENGSTLER,
"GOLDEN BELL,
"Proctors for Libelant. [303]

(Endorsed: "No. 16,058. U. S. District Court Northern District of California. W. R. Grace & Co., Libelant, vs. Ford Motor Company, etc. et al., Respondents. Praecipe for Citation and Monition. Filed Jun. 27, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.")

"Northern District of California,—ss.

"The President of the United States of America, to the Marshal of the United States for the Northern District of California—GREETING:

[Seal]

"Whereas a Libel hath been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of June in the year of our Lord, one thousand nine hundred and sixteen. By W. R. Grace & Company, a corporation, against The Certain Automobiles and Parts in Packages, and 1,100 Packages on Pier 26, San Francosco, Cal., in a cause of action for damages, $319,500.00, civil and maritime, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said certain automobiles and parts in packages & 1,100 Packages on Pier 26 may be cited in general and special to answer the premises, and all proceedings being had that the said certain automobiles and parts in packages may for the causes in said Libel mentioned, and 1,100 Packages on Pier 26 be condemned and sold to pay the demands of the Libelant,

"You are therefore hereby COMMANDED to attach the said Certain Automobiles and Parts in Packages, and 1,100 Packages on Pier 26, and to retain the same in your custody until the further [304] order of the Court respecting the same and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Northern District of California, on the 11th day of July, A. D. 1916, at 10 o'clock in the forenoon of

the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf.

"And what you shall have done in the premises you then and there make return thereof, together with this writ.

"Witness the Hon. M. T. DOOLING, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 27th day of June, in the year of our Lord, one thousand nine hundred and sixteen.

"W. B. MALING,
"Clerk,
"By C. W. Calbreath,
"Deputy Clerk.

"ANDROS & HENGSTLER,
"Proctor for Libelant.

"MARSHAL'S RETURN.

"In obedience to the within Monition, I attach "the property herein described, on the 27th day of June, 1916, and have given due notice to all persons claiming the same that this Court will, on the 11th day of June, 1916, (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on

the herein named Property and placed a keeper in charge thereof.

"J. B. HOLOHAN,
"United States Marshal. [305]
"By Lawrence J. Conlan,
"Office Deputy.

"San Francisco, Cal., July 11, 1916.

(Endorsed: "Marshal's Docket No. 7795. No. 16,058. District Court of the U. S., Northern District of California, First Division. W. R. Grace & Co. vs. Certain Automobiles and Parts in Packages. Monition ret'ble July 11th, 1916. ———, Proctor for Libelant. Issued ———, 191—. Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.")

"In the District Court of the United States for the Northern District of California.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & COMPANY, a Corporation,

vs.

CERTAIN AUTOMOBILES AND PARTS IN PACKAGES, 1100 Packages on Pier 26, San Francisco, California, Consigned to Order of FORD MOTOR COMPANY OF CANADA, LIMITED.

"AFFIDAVIT OF PUBLICATION.

"State of California,
City and County of San Francisco,—ss.
"E. C. Luchessa, being first duly sworn, deposes

"That he is and at all times hereinafter mentioned was a citizen of the United States, over the age of twenty-one years, and a resident of said City and County; and is and was at and during all said times the principal clerk of The Recorder Printing and Publishing Company, printers and publishers of 'The Recorder,' a newspaper of general circulation printed and published daily (Sundays and legal holidays excepted) in the City and County of San Francisco, State of California; [306] that said 'The Recorder' is and was at all times herein mentioned, a newspaper of general circulation, as that term is defined by Section 4460 of the Political Code; its status as such newspaper of general circulation having been established, pursuant to Section 4462, Political Code, by a decree of the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, Judge, made and entered on the 11th day of October, 1905, which said decree was restored by a judgment given in the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, judge, made and entered on the 2d day of December, 1907, and recorded in Record Book 15, at page 155 thereof; and as provided by said Section 4460, is and at all said times was published for the dissemination of local and telegraphic news and intelligence of a general character, having a *bona fide* subscription list of paying subscribers, and is not and never was devoted to the interests, or published for the entertainment or instruction of a particular class, pro-

fession, trade, calling, race or denomination, or for the entertainment and instruction of any number of such classes, professions, trades, callings, races or denominations; that at all said times said newspaper had been established, printed and published in said City and County of San Francisco, State of California, at regular intervals for more than one year preceding the first publication of this notice herein mentioned; that said notice was set in type not smaller than nonpareil and was preceded with words printed in black face type not smaller than nonpareil, describing and expressing in general terms the purport and character of the notice intended to be given; that a Monition is the above-entitled matter, of which [307] the annexed is a true printed copy, was published in said newspaper on the following dates, to wit: June 29 and 30, 1916, and July 1, 3, 5, 6, 7, 8, 10 and 11, 1916; being as often as said newspaper was published during said period; and further deponent saith not.

"E. C. LUCHESSA.

"Subscribed and sworn to before me this 11th day of July, 1916.

"[Seal] CHARLES R. HOLTON,

"Notary Public in and for the City and County of San Francisco, State of California.

"MONITION.

"In the United States District Court, for the Northern District of California.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & COMPANY, a Corporation,

vs.

CERTAIN AUTOMOBILES AND PARTS IN PACKAGES, 1100 PACKAGES ON PIER 26, SAN FRANCISCO, CALIFORNIA, Consigned to Order of FORD MOTOR COMPANY OF CANADA, LIMITED.

"In obedience to a warrant of seizure to me directed, in the above-entitled cause, I have seized and taken into my possession the following described personal property, to wit: Certain automobiles and parts in packages, 1100 packages on Pier 26, San Francisco, California, consigned to the order of Ford Motor Company of Canada, Limited.

"For the causes set forth in the libel now pending in the U. S. District Court for the Northern District of California, at San Francisco, California, I hereby give notice to all persons claiming the said described certain automobiles and parts in packages, 1100 packages on Pier 26 San Francisco, California [308] consigned to order of Ford Motor Company of Canada, Limited, or knowing or having anything to say why the same should not be condemned and forfeited, and the proceds thereof distributed according to the prayer of the libel, that they be and appear before

the said Court, to be held in and for the Northern District of California, at the United States court-room, in the City of San Francisco, on the 11th day of July, 1916, at 10 o'clock on the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf.

"J. B. HOLOHAN,

"U. S. Marshal, Northern District of California,

"By L. J. Conlon,

Deputy.

"June 29 td."

(Endorsed: "No. 16,058. In the District Court of the United States for the Northern District of California. In Admiralty. W. R. Grace & Company, a Corporation, vs. Certain Automobiles and Parts in Packages, etc. Affidavit of Publication in 'The Recorder' of Monition. J. B. Holohan, U. S. Marshal, San Francisco, Cal.")

"Northern District of California,—ss.

"The President of the United States of America, to The Marshal of the United States for the Northern District of California —GREETING:

[Seal]

"Whereas, a Libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of June in the year of our Lord, one thousand nine hundred and sixteen, by W. R. Grace & Company, a corporation, vs. Ford Motor Company. [309] of

Canada, Ltd., a corporation in a certain action for damages, civil and maritime, to recover the sum of $319,500 (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant and praying that a citation may issue against the said respondent, pursuant to the rules and practice of this Court; NOW, THEREFORE, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if it shall be found in your District, that it be and appear before the said District Court, on Tuesday, the 11th day of July, A. D. 1916, at 10 o'clock in the forenoon at the courtroom in the city of San Francisco, then and there to answer the said libel, and to make its allegations in that behalf; and have you then and there this writ, with your return thereon.

"WITNESS, the Honorable M. T. DOOLING, Judge of said court, the 27th day of June in the year of our Lord, one thousand nine hundred and sixteen.

"WALTER B. MALING,
"Clerk.
"By C. W. Calbreath,
"Deputy Clerk.

"ANDROS & HENGSTLER,
"Proctor for Libelant.

"MARSHAL'S RETURN.

"I hereby return that I am unable to find the Respondent Ford Motor Company of Canada

(Ltd.), a Corporation in my District, this 11th day of July, A. D. 1916.

"J. B. HOLOHAN,
"U. S. Marshal.
"By Geo. H. Burnham,
"Chief Deputy Marshal."

(Endorsed: "Marshal's Docket No. 7795. No. 16,058. U. S. District Court, Northern District of California, First Division. W. R. Grace & Co., a Corp., vs. Ford Motor Company of Canada. Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, [310] Deputy Clerk.")

"UNITED STATES MARSHAL'S RETURN.

"I certify that after due and diligent search and inquiry, I am unable to find the within named respondent within the Northern District of California, and that in obedience to and under and by virtue of the within Writ, I attached the goods and chattels, which are described as follows and which were found within said Northern District of California, to wit: One Hundred and eighty (180) cars of automobiles shipped by the Ford Motor Company of Canada, Limited, from Walkerville, Ontario, and consigned to the order of Ford Motor Company of Canada, Limited, or to W. R. Grace & Company at San Francisco, which cars moved over the lines of the Southern Pacific Company and connecting carriers to San Francisco, and all of said automobiles and parts contained in said shipment being at San Francisco and in the possession of said Southern Pacific Company with the exception

of thirty (30) cars of automobiles which were delivered to W. R. Grace & Company at Pier 26, San Francisco; all of said automobiles and parts in packages being claimed by the Ford Motor Company of Canada, Limited, a corporation, and released by me upon said respondent furnishing a bond in the sum of four hundred thousand dollars, as appears from the records and files in the office of the clerk of said court.

"J. B. HOLOHAN,
"United States Marshal.
"By Lawrence J. Conlon,
"Office Deputy.

"San Francisco, California, July 11, 1916. [311]

"In the District Court of the United States, for the Northern District of California, First Division.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

"CITATION AND ORDER FOR FOREIGN ATTACHMENT.

"The President of the United States of America, to the Marshal of the Northern District of California, GREETING:

"WHEREAS, a libel was filed in the District

Court of the United States, in and for the Northern District of California, on the 27th day of June, in the year of our Lord one thousand nine hundred sixteen, by W. R. Grace & Co., a Corporation, Libelant, against the above-named respondent, Ford Motor Company of Canada, Ltd., in a certain cause of contract civil and maritime, for recovery of $319,-500.00 damages alleged to have resulted to said libelant through the failure of said respondent to perform its duties and obligations under and by virtue of the terms of a certain agreement whereby said respondent agreed to ship certain merchandise from San Francisco to Australia on libelant's steamship 'Cacique,' to the damage of libelant, in said sum of $319,500.00, and praying that a citation may issue against said respondent pursuant to the rules and practice of this court, and that the goods, chattels and credits of respondent in this district may be attached to compel the respondent's attendance in case it cannot be found;

"NOW, THEREFORE, we do hereby directly charge and empower [312] and command you, the said Marshal, that you warn said respondent Ford Motor Company of Canada, Ltd., if it shall be found in your District, to be before said District Court of the United States, at the Postoffice Building in the city and county of San Francisco, State of California, on the 11th day of July, A. D. 1916, at ten (10) o'clock A. M., then and there to answer the said libel and make its allegations in that behalf; and if said respondent cannot be found in your District, we command you that you attach its goods

and chattels in your District to the amount sued for; and if sufficient goods and chattels cannot be found, then that the credits and effects of said respondent in the jurisdiction of this Court may be attached, and that you cite the persons in whose hands or possession such credits and effects may be to appear and answer on oath as to such credits and effects in their hands belonging to said respondent; and have you then and there this writ with your return thereon.

"WITNESS the Honorable MAURICE T. DOOLING, Judge of said court, this 27th day of June, in the year of our Lord one thousand nine hundred sixteen.

"[Seal] W. B. MALING,
Clerk.

"C. W. Calbreath,
"Deputy Clerk U. S. District Court, Northern District of California.

"ANDROS & HENGSTLER,
"GOLDEN W. BELL,
"Proctors for Libelant.

"In the District Court of the United States, for the Northern District of California, First Division.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents. [313]

"RETURN OF SOUTHERN PACIFIC COMPANY TO CITATION AND ORDER FOR FOREIGN ATTACHMENT AND TO GARNISHMENT.

"Now comes Southern Pacific Company, a corporation, organized and existing under and by virtue of laws of the State of Kentucky, and makes the following return to the citation and order for foreign attachment and to the garnishment heretofore served upon it in the above-entitled proceedings, to wit:

"Said respondent, Ford Motor Company of Canada, Ltd., caused to be shipped from Walkerville, Ontario, 180 cars of automobiles consigned to W. R. Grace & Co., at San Francisco, which said cars moved over the lines of Southern Pacific Company, and connecting carriers, to San Francisco, and all of the automobiles and parts contained in said shipments are now at San Francisco in the pos-

session of said Southern Pacific Company, with the exception of 30 cars of automobiles which were delivered to W. R. Grace & Co., at Pier 26, San Francisco, and are now in the custody of the United States Marshal. A statement showing the number and initials of the cars contained in said shipments, the contents, point of origin, waybill reference, point of destination, the party to whom notice of such shipments was to be given (said shipments moving under order bills of lading), and the steamer via which said shipments were to be transported from San Francisco, was filed with the Marshal on June 28, 1916, and the same is hereby specifically referred to and made a part of this return.

"Said Southern Pacific Company has in its possession no other property belonging to said Ford Motor Company of Canada, Ltd., nor is it indebted to said Ford Motor Company of Canada, Ltd., in any sum or sums whatsoever. [314]

"SOUTHERN PACIFIC COMPANY.

"By T. O. EDWARDS,

"Assistant Secretary.

"C. W. DURBROW,

"FRANK B. AUSTIN,

"Proctors for Southern Pacific Company.

"State of California,

City and County of San Francisco,—ss.

"T. O. Edwards, being duly sworn, deposes and says:

"That he is an officer, to wit: Assistant Secretary of Southern Pacific Company, a corporation, named

in the foregoing return and that he is duly qualified and authorized to make this verification for and on behalf of said corporation; that he has read the foregoing return to the citation and order for foreign attachment and garnishment and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

"T. O. EDWARDS.

"Subscribed and sworn to before me this 6th day of July, 1916.

"[Seal] HUGH T. SIME,

"Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed: "No. 16,058. In the District Court of the United States, Northern District of California, First Division. In Admiralty. W. R. Grace & Co., etc., Libelant, vs. Ford Motor Company of Canada, etc., Respondents. Return of Southern Pacific Co. to Citation and Order for Foreign Attachment. Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. ———, Proctors for S. P. Co., 828 Flood Building, San Francisco, Cal.") [315]

Mr. HENGSTLER.—If your Honor please, I would like to hand you a copy of my argument, and I will hand a copy of it to the other side.

OPENING ARGUMENT OF L. T. HENGSTLER, ESQ.

Mr. HENGSTLER.—This case revolves upon the construction of a contract, and in particularly a clause of the contract which reads as follows:

> "Shipment per American S. S. 'Cacicue' June Loading."

These words are in the first line of the clause. Then there is a semicolon; then follow these words in the next two lines:

> "When vessel is closer at hand, will advise you more definitely as to exact loading date."

I wish to call your Honor's attention to the fact that there is no comma between the words "'Cacicue'" and "June loading." A comma crept in, in the briefs on the other side, and inadvertently into the opinion rendered by your Honor on the former occasion when exceptions to the answer were passed upon; I consider that comma of some importance in the interpretation of this clause.

The second part of the clause speaks of the exact loading date, and it provides that this exact loading date will be given to the other side in the future, some time in the future, namely, when the vessel is closer at hand; in other words, as to any exact loading date I cannot tell you at the present time. That is the information given on the 25th of February; I cannot advise you definitely, the contract says, in any other way except in so far as the remainder of the clause designates it as "'Cacicue' June loading."

Under our construction of the contract from the language itself, and I will show to your Honor that the actions of the [316] parties carry out and support that construction of the contract and that the correspondence which was introduced in evidence does support that construction of the contract, the question is not as to what "June loading" means, but the question is as to what "'Cacicue' June loading" means.

The contract provides that the shipper will be advised more definitely than it is advised by the words "'Cacicue' June loading" later on, when the vessel is closer at hand. There is no precise date fixed in this contract, therefore, for the loading of the vessel.

Now, what is the meaning of the words "'Cacicue' June loading"? Our contention is that it means "Cacicue's June loading," under all the circumstances as they will appear and have appeared in the evidence in this case. The respondent's contention is that these words "Cacicue June loading," after you detach the words "June loading" from the word "Cacicue" mean a condition precedent, that the "Cacicue" must load in June, and that if she does not load in June, that then the contract is automatically cancelled, as it has been stated in one of the letters.

If such were the intention, it certainly could be very easily expressed by the usual words used in cases where such an intention is intended to be expressed; for instance, the words "Warranted to load in June"; or words like these, "Provided that the

'Cacicue' load the shipment in June"; or, "If the ship is not ready to load in June the shipper shall have an option to cancel."

Now, any of these expressions would have been very simple to add if the intention of the shipper had been that the "Cacicue" loading must be made in June. On the other hand, our contention [317] is that the words mean "Per American S.S. 'Cacicue's' June loading." Your Honor has to choose between these two contentions. With reference to that, I want to call your attention to the general principle of law applicable in a case of that sort. If the words "June loading" are detached and if we had to do here with a contract of sale, it would have been a very much simpler case and the position of the other side would be very much more susceptible than it is admitted, but we do not deal in this case with a contract of sale, but with a contract of affreightment.

In the first volume of Parsons on Maritime Law, page 272, the author says:

> "It may almost be said that there is a presumption of law, for there is certainly a strong disposition of the courts against such a construction of a covenant or promise as would make it a condition precedent."

And in Abbott on Shipping,—I have it here page 368, but I am almost sure there is a mistake about that, and if there is I would like to ask permission to make a correction, and that will apply to any other clerical errors that there might be in my

memorandum, for I had to get it up very hurriedly,—the following is said:

> "An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed."

That carries out the same idea which is contained in Parsons, that the disposition of the courts is against such a construction, and that there is practically a presumption of law that where the words are not clear, where it does not say, "Warranted to load in June," or words to the same effect, the Courts will not construe the words as a condition precedent [318] or a warranty.

As the intention is drawn from the language of the contract alone, the first line describes the shipment. It begins with the word "Per." The word "Per" connotes an instrumentality, a method, by what method, by what instrumentality the shipment is to be made. The answer is in the remaining part of this contract: "S.S. 'Cacicue' June loading."

At this point we have to look up from the four corners of the agreement, because the words "'Cacicue' June" cannot be explained by purely grammatical means. What do the words "'Cacicue' June" mean? Your Honor has the testimony on that point as to what the "Cacicue" was at the time, and where she was, and what the parties understood with reference to the "Cacicue."

On the question of interpretation, and for the purpose of overcoming the contention of the respondent that it meant "Warranted to load in

June," I want to recall to your Honor's mind the case of Reed vs. Insurance Co., 95 U. S. 23. In that case an insurance contract provided as follows:

> "Risk to be suspended while vessel is at Baker's Island loading."

The question was, whether the clause means, while the vessel is at Beker's Island for the purpose of loading, or while it is at said island actually loading. The clause on the face of it, was ambiguous. The Court says: "A strictly literal construction would favor the latter meaning"—that is to say, it would favor the meaning "actual loading." If the words "June loading" are to be detached from "Cacicue," it may be that a strictly literal meaning would aid the respondent in this case. [319]

"But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in

which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the Court, in construing their language, from falling into mistakes and even absurdities."

Taylor says in his work on Evidence, section 1085:

"It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the Courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it."

In that connection, I would like to refer your Honor to a case which was omitted here through inadvertance, the case of Hull Coal Co. vs. Empire Coal Co., 113 Federal, 261, a Circuit [320] Court of Appeals case, in which the Court laid down the rule, in line with the cases cited, that the intention is to be ascertained in connection with the subject matter and the attendant circumstances, the situation of the parties, the purpose of the contract. The Court says:

> "When these are ascertained, they must prevail over the dry words used."

Now, in this case, if your Honor please, even on the very face of the contract it is not necessary to do any violence to the words or to their meaning for the purpose of adopting the view taken by the

libelant as to the meaning of this contract. I think it would be necessary to do violence to the language to read into it the warranty. But the circumstances which were shown here before the Court show that no intention existed on the part of either party to make the June loading a condition precedent.

I refer your Honor, first, to Mr. Moore's testimony. He told Mr. Davis, when Mr. Davis came to him, that it was impossible to figure definitely on any steamer of that sort, a tramp steamer, which is not running on any schedule. The gist of his testimony was that in a favorable voyage to Vladivostok and return she ought to be here to load sometime in June,—and remember those words, your Honor, she ought to be here to load sometime in June.

Again, he says: "Probable June loading was the only thing that was discussed by Mr. Davis."

On cross-examination he says: "The understanding was that the cargo was to be lifted when the 'Cacicue' returned from Vladivostok; we designated that voyage as her June loading in San Francisco to distinguish it from her March-April loading when [321] she left for Vladivostok."

So that the meaning of the parties when they wrote this contract was that this cargo should be lifted per American steamship "Cacicue" when she returned from Vladivostok at the end of her second voyage; that it was the "Cacicue" June loading to distinguish it from the "Cacicue's" March-April loading, which was the intention of the parties.

Mr. Carter, in his testimony, says that Mr. Davis

was particularly anxious that the steamer should not be too early. I will show to your Honor afterwards that the correspondence which was offered here will show, that the main desire on the other side was that she must not be too early; they were crowded in getting out automobiles at their factory; the discussion at that time was the possibility of their cargo not being ready in case a vessel made early June.

That is strongly supported by the correspondence, as will be seen in a few minutes. Mr. Davis' testimony is this:

> "We were looking over the map and it seemed that the 'Cacicue' was about the only boat that we could figure on which would arrive here for June sailing."

They were figuring on a boat, if your Honor please, four months ahead, which had two long voyages ahead of her. The words "figure on" show that at that time Mr. Davis understood that there was no exact loading date, or exact date of arrival which could be determined, otherwise they would not have figured upon that vessel. If he at that time had required, or if the requirement of an exact time had been his object, would he not have made a contract which would have guaranteed or warranted June loading?

He testified he knew the difference between June loading and June [322] sailing. If it had been in his mind at that time that there was June sailing necessary, as he testified, could he possibly have subscribed to a contract which on the very face of it

never mentioned anything about June sailing, never provided anything about June sailing?

He testified that on February 25, two days before the date of the contract, he received this telegram from respondent:

> "Accept Grace offer 6200 tons. Confirm advising names and dates of sailing."

Mr. McCutchen asked him:

> "That was your authority to sign the contract, was it not, Mr. Davis? A. Yes."

There is nothing mentioned in that telegram giving him any instructions with reference to any sailing in June, or any loading in June, or any particular time of loading.

If the respondent had at that time considered it essential that the libelant should guarantee a June loading, would not such an essential have been mentioned in the authority that was given to Mr. Davis to make the contract? Under this authority which was given to him, he was certainly justified in making a contract which left the date of sailing, or even the date of loading, an elastic quantity—elastic, of course, within reasonable limits.

Mr. Davis' answer to the telegram, on February 27, was as follows:

> "Have signed with Grace American Steamer 'Cacicue' about June 24."

Would that be his answer if there had been any point made on [323] the part of these parties that there must be an exact loading date? Would he have said "about"? I submit to your Honor that this telegram is more consistent with "'Caci-

cue' loading about June" than it is with the contention of the other side that the "Cacicue" guaranteed to load in June was contemplated.

On cross-examination Mr. Davis said:

> "Q. Mr. Davis, do you remember that you told me in the presence of Mr. Moore and Mr. Florintine on that occasion that there was one feature you remembered distinctly, namely, that no exact time for the arrival of the 'Cacicue' was intended to be stipulated, on the ground that it was impossible, so long ahead, for any steamship man to fix any time?
>
> "A. For the arrival of the steamer?
>
> "Q. Yes. A. I believe I did."

Your Honor will remember that that statement was made after he had refreshed his memory by examining respondent's correspondence.

"Shipment per"—shipment by what method, by what ship, by what voyage? That is what the first line indicates. The second and third lines indicate the time of shipment. In other words, the meaning of the first line was, "Per American steamship 'Cacicue' June loading," meaning thereby per American steamship "Cacicue's" second loading after date. Then when the vessel is closer at hand I will advise you more definitely as to exact time. It does not say as to the exact day in June. We are entitled to the benefit of the meaning of the words. It says, as to exact date. The correct expression would have been, as to exact loading day, if it had referred to a day in June. "Date," in grammar and in the dictionary, means month and day. When the

vessel is nearer at hand I will advise you more definitely as to the exact day and month when [324] the loading is expected to begin.

This construction of the contract is strongly supported and confirmed by respondent's own practical interpretation of the contract as the actions and the correspondence between the respondent and Mr. Davis clearly show.

On February 28 respondent wired to Mr. Davis:

> "We need about 4000 tons in addition, say for late June early July sailing."

I cite that for the purpose of showing to your Honor that in making their contracts it was never intended to get any exact sailing date, or any exact loading date, or any exact date of arrival of a vessel.

"Say for late June early July sailing." The word "say" in this connection is significant.

On March 2d the respondent wired to Mr. Davis:

> "Understand you have arranged 6200 tons; this is all we will need to end of July."

March 3, respondent to Davis:

> "We have contracted 2000 and 6000 tons; understand you have engagement by steamer 'Cacicue' 6200 tons. We need only about 6000 tons in addition to what we arranged, and would like this for June-July sailing."

It seems to me that that covers the "Cacicue" case.

Then, evidently, they had too much tonnage and not enough cargo. On March 4 Mr. Davis wired to respondent:

"You have all the space required up to June and July, and will need no more until late July or early August."

That shows that the freight engagements of the respondent were not required or intended with reference to any exact dates at any time, but were always intended to be approximate only. [325] It also shows that present contracts extended to late July or early August.

On March 28 respondent advised Davis for the first time that it had only 4284 tons to cover a contract for 6200 tons, which Davis notes "with considerable surprise" on April 3. This date, March 28,—and that is about a month after the contract was made—wherein it appears clearly that the respondent has difficulty in filling his contract, it didn't have any 6200 tons to send. Thereafter, many attempts were made to make up the shortage, one being a contract made between Mr. Davis and Henry W. Peabody & Co., of San Francisco. This is an important contract in this connection, your Honor. It was made on May 5, 1916, in the form of a letter by Davis and accepted by Peabody. In this letter Davis contracts for 542 measurement tons of 40 cubic feet each, per W. R. Grace & Co.'s S. S. 'Cacicue' loading at San Francisco about July 1st for Sydney and Wellington. For the purpose of making up the deficiency in the cargo which was to go into the "Cacicue" under the contract of February 25, he contracts with somebody else for a cargo to fill this contract and to comply with this contract loading at San Francisco about July 1st.

Is this language consistent with the claim and the contention that there was a June loading guarantee? Does it not show, per American steamship "Cacicue" June loading, that they, themselves, say it means per American steamship "Cacicue" loading about July 1st?

On May 27 Mr. Davis informed respondent that the "Cacicue" would sail about July 10. On the same day he wrote to respondent:

> "We intend to go on and secure cargo if it is possible."

He understands that this contract must be carried out, although [326] "Cacicue" will not sail until July 10.

On May 31 he writes to respondent a very significant letter:

> "Any cars here after July 1st Union Steamship Company will give to Grace provided you will guarantee to Union Steamship Company sufficient cars in equal quantities later."

On May 31, therefore, Mr. Davis, himself, suggests a delivery to the "Cacicue" after July 1 if cargo is obtained from the Union Steamship Company; in other words, will fill this contract. It is within the terms of this contract, as he understands it, and he was a party to the contract.

On May 31 respondent writes to Davis in the following words:

> "It is a surprise to us to note that up until Saturday, last, we were still led to believe that the 'Cacicue' would sail on the 14th of June. This information, that she is not to sail until

> July 10, relayed to Australia some time ago, would have allayed a considerable fear on their part that shipments would arrive piling up one on the other, causing congestion to a considerable degree."

Isn't this a sign of relief, when they find out that they can prevent the congestion in Australia by the lucky circumstance that this vessel would not arrive as early as she was expected to arrive, and that they would not have to send these automobiles to Australia until a later time.

When he speaks of "a handicap at this end," he complains of the fact that he had been laboring under this idea, and had not been informed of the very pleasant fact that the "Cacicue" would not arrive until later than they had expected, and he speaks of not having been informed of that sooner.

In this connection it may be proper, also, to refer your [327] Honor to an allegation in the answer of the respondent, to the effect that it sold a large quantity of automobiles for delivery in New Zealand and Australia, actual shipment of which by water was required to be made during the month of June. It is upon that that they evidently base their contention that it was necessary to make a warranty of June loading in order to meet the Australian requirements.

If this correspondence does not show just the opposite, I cannot read the English language correctly.

On June 1st Mr. Davis, working with the Union Steamship Company on supplying the deficiency for the "Cacicue," wrote to respondent as follows:

> "They are willing to allow us to have any cars which might arrive later than July, 1st which we can turn over to Grace & Co. for the 'Cacicue.' "

The Union Steamship Company was willing to allow them to have any cars which might arrive later than July 1st.

Here is another solution of this car difficulty of supplying the 6200 tons: We can get some cars, all the cars which will arrive later than July 1st. Isn't that in confirmation of their understanding that this is a proper way of filling this contract?

On June 3 the respondent wrote a letter to the Ford Motor Company of San Francisco, sending invoices and bills of lading on autos "which we expect to go forward on the following steamers: 'Kilgardie,' June 3; 'Waimarino,' June 30; 'Cacicue,' July 12."

Your Honor will notice that the "Waimarino" was expected by the respondent to sail on June 30th—the last day of June. They expected the "Waimarino" cargo to go forward on that date; [328] they did not expect the "Cacicue" cargo to go forward until July 12.

With their difficulty in finding cargo, does not this naming of the two ships, the "Waimarino" on June 30, and the "Cacicue" on July 12, indicate how glad they must have been that the "Cacicue" did not come in in time for June 30, when respondent did not have the autos to fill the "Cacicue," and did not have the machines to fill the "Waimarino," as it appears incidentally from the correspondence?

It appears that there was trouble about the "Waimarino."

That shows that the respondent wanted the "Cacicue" very much for the 4000 odd tons, but not for the 6200 tons, and wanted the "Cacicue" very much for July 12 or a later loading than June, but disliked the rate. Certainly if the "Cacicue" shipment had gone forward on June 30, their troubles would have been multiplied, because it would have increased the congestion in Australia of which they speak in their correspondence.

On June 6th Mr. Davis replied to respondent:

> "Get freight moving. Grace now figures 'Cacicue' will clear July 5th; the rates are going down."

On June 7 Mr. Davis writes to respondent as follows:

> "We sincerely hope that you will be able to fill the space with your own cars"—after having tried to get cargoes from others unsuccessfully.

He says:

> "The movements of the boat led us to believe that it would be much later than the middle of June for her departure, and it is now our hope that she will even be as late as the 10th of July." [329]

That was their only salvation, that she would be as late as the 10th of July; they wanted her to be late; that was because their chances of finding sufficient cargo were improved by the late arrival, and that they were afraid she would arrive in June.

Down to May 27th the correspondence discloses an apprehension on the part of the respondent that the vessel would arrive too soon to enable them to supply this cargo. The last hope of the Union Steamship Company giving them the 1500 tons was now gone. The rates were falling. It became impossible for the respondent to fill the space without suffering loss. The congestion of cars in Australia caused an apparent necessity to cut down the "Cacicue" cargo, even from the 4075 tons by the Sydney, Brisbane and Melbourne cars. On June 9th the respondent wired to Davis with reference to the necessity of cutting down even the 4075 tons.

Now, this is an important stage in this correspondence, if your Honor please, about the beginning of June. The only salvation for the respondent to fill its contract was that this ship would not arrive too early. Then at that time the respondent hit upon this way out of the whole thing, namely, the theory of the June loading, the guarantee of the June loading, and getting out of the contract altogether. Thereupon witness Mr. Davis' sudden change of front on June 8th, when he wired respondent as follows: "Unless you intend reshipping Normandy cargo we think best stand firm on June loading," meaning, unless you can ship a cargo to arrive after July 1st, which will reduce or wipe out your damages, "cancel on the ground that the ship should have arrived before July 1st." [330] The Normandy contract was another way by which they could have made up that deficiency. So that meant that unless you can reship a cargo to arrive after

July 1st cancel this contract on the ground that the ship should have arrived before July 1st. And in all his letters to the respondent down to the day when he had legal advice, he understood that the contract which he had made would have been satisfied by loading the "Cacicue" during the month of July. This contract was never intended to give to respondent any right to cancel if the ship should not be ready to load until July.

That is what the correspondence discloses. I still think, if your Honor please—and I dislike to bring this question up again because it always stirs up something, but there is not the slightest reflection on the attorneys in the case, I say I still think that more light yet would have been thrown upon this phase of the case if the people in the office of the Ford Motor Company of San Francisco had not destroyed the correspondence before this contract was made. I still am entitled to any proper and fair inference which can be drawn from that fact, that these people destroyed a correspondence after an important lawsuit was pending with reference to it.

The contract, itself, I think, without doing any violence to the language, can be properly construed as the libelant construes it. But, in addition to that, all the circumstances show that all of the parties to this contract, the parties who made the contract, Mr. Moore, Mr. Davis, Mr. Carter, understood that there should not be a guarantee in that case. And the correspondence shows that it did not suit the respondent at all, and it never dreamed of

such a thing [331] until the time came when they could not fill their contract, when they could not get the machines, when they could not fill the ship at all, and they had to hunt around for a straw to cling to.

My next point is that respondent was never ready or willing to perform its contract.

A month after making the contract, on March 28th, the respondent wrote to Davis, or wired to Davis:

> "We will need only 4284 tons of this capacity; that we do not need the 6200 tons is due to the fact that we have succeeded in obtaining two steamers from the New Zealand Shipping Company, taking a considerable number of cars which would otherwise have had to go by steamer 'Cacicue.'"

Here is a clear indication that we are not going to furnish 6200 tons, we are not going to stand by this contract. The reason given is that they have made another contract, a contract with the New Zealand Shipping Company, which leaves the Atlantic Coast directly, and which would save all the railroad freight across the continent.

April 4, respondent to Davis:

> "Sent difference between 4282 and 6200 tons by another cheaper steamer."

April 19, respondent to Davis:

> "We are supposed to have 6200 tons on this steamer; actually we have cars for only 4572 tons; we engaged space for certain cars by the

steamship W. & P., which otherwise would have gone on the 'Cacicue.' "

On May 20, respondent to Davis:

"We had not assumed that we were going to be held for 6200 tons space." [332]

The letters of June 1 and June 6 sent to libelant clearly show that 4075 tons is the most that respondent ever had ready for this contract.

The evidence and the correspondence show that the real reasons for this inability and the unwillingness of the respondent to perform this contract were the following:

In the first place, the "Cacicue" cargo had been diverted to vessels offering a cheaper freight, a $35 freight instead of a $47.50 freight.

In the second place, there was a new method of crating invented by the factory, and that reduced the tonnage. On May 11 respondent wrote to Davis:

"We advised you some time ago that we would have 1316 cars for the 'Cacicue,' but we find it impossible to ship this number on account of new method of crating."

On May 25 they say:

"We had warned them (the factory) that cutting down the space on the knocked down shipment during the progress of the filling of any contract would materially alter our calculations. They, however, went forward with these experiments."

That fact, alone, interfered with the carrying out of their contract. Evidently, they had over-

contracted for space, for more space than they could fill.

The third real reason for the inability was the congestion in Australia. That congestion made it desirable to cancel some of these contracts, if they could, or, if not, to at least extend the loading dates of these contracts.

On May 31 the respondent wrote to Davis:

> "This information (that the 'Cacicue' would sail later than expected, when it was expected that she would sail on [333] June and did not like it but were glad to learn that she would not sail until July 12) relayed to Australia would have allayed considerable fear on their part that shipments would arrive piling up one on the other, causing congestion."

On June 9, respondent wired to Davis:

> "Owing congestion Australia may be necessary cut down 'Cacicue' cargo by Sydney, Brisbane and Melbourne cars, and ship these later."

In other words, on June 9 even the 4075 tons would have been cut down by the Sydney, Brisbane and Melbourne cars. And if your Honor would care to see how many tons that left, your Honor will note that if they had carried that out in their own interests there would have been hardly any cargo left for the "Cacicue." The only cargo that would have been left would have been the Wellington and New Zealand cargo, and that was comparatively a small portion.

I call your Honor's attention to the allegation in

the answer, that the Australian contracts require actual shipments by water in June.

The fourth real reason for the inability, or, rather, the motive for the inability of the respondent to perform, was the drop in freight rates and the engaging of cheaper freight. As early as April 4 respondent advised Davis that they made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of $35 per ton. That was $12.50 a ton cheaper than this rate, and in addition to that, it saved the transportation across the continent. Those were the real reasons.

Now, if your Honor please, what were the pretended reasons, [334] the reasons given to the libelant in this case, and to Mr. Davis?

First, they started in in the east, telling Mr. Davis that they never received his contract, hence they assumed that it was not binding. That is a very false reason. Your Honor remembers the early telegrams by which they were informed by Mr. Davis very promptly, wherein he said he had made a contract for 6200 tons. Now, that is not an honest way of getting out of it.

The next reason given to libelant was that "June loading" requires in the parlance, as they express it, June sailing. That certainly is not a correct reason.

Then another reason that appears from their correspondence with libelant was that Mr. Davis was not authorized, drawing a distinction between the Ford Motor Co. of Canada and the Ford Motor Co.

of San Francisco, in effect that the Ford Motor Co. of San Francisco had no right to make such a contract.

Our third point is that the correspondence shows existence of deliberate intention on the part of respondent not to perform this contract.

As early as March 28 the respondent wrote to Davis:

> "We will need only 4284 tons of this capacity."

On April 19th:

> "We are supposed to have 6200 tons on this steamer, we have cars for only 4572 tons."

May 11th:

> "Advised you some time ago that we would have 1316 cars for the 'Cacicue,' but we find it impossible to ship this number." [335]

May 16th:

> "Total cubic measurement from shipment for 'Cacicue' 4084 tons."

May 26th:

> "Total cargo will be 4075 tons."

June 1st:

> "We have shipped 1290 autos for Grace."

June 3d:

> "Which we expect to go forward 'Cacicue' July 12th."

My next point is this: Respondent committed an anticipatory breach of the contract. This phase of the case is fully covered by our opening brief on the exceptions, and all the authorities are given in our opening brief.

I will refer your Honor to that as to the law. I do not think it is necessary to refer to that, because I take it that your Honor, in passing upon the question before you at that time, examined those authorities.

Mr. McCUTCHEN.—It is proper to say that his Honor considered that at that time for a limited purpose. I suggest that to you so that if you see fit you can cover your case fully as to that point.

Mr. HENGSTLER.—In addition to the authorities given in that brief, to which I refer your Honor, I have here added a few other ones since discovered:

Giving notice that respondent would not perform at all, unless the contract was modified, is a breach.

That is what was done in this case. The respondent notified us that they would not perform at all unless the contract was modified. They told us, "We won't give you anything unless you take less than what you agreed. We agreed to 6200 tons, [336] but we won't give them to you, we will give you 4075 tons. Unless you accept this as a new contract, we will not perform at all." That is the gist of what they said to us.

Declaring an intention not to be bound by the contract, is a breach.

Insisting upon new terms different from the original agreement, is a breach.

The new authorities I refer your Honor to in addition to the brief on file in this court are cited here:

Johnson Forge Co. vs. Leonard, 51 Atlantic, 305;

Bryson vs. McCone, 121 Cal. 153;

Anson, Contracts, 283.

The fifth point is libelant's right of action had accrued on July 27, when this libel was filed.

Assuming the existence of an anticipatory breach, a *prima facie* case for damages existed; and accepting the law of this case as declared in your Honor's opinion in deciding exceptions to the answer, the Court is bound to render a decree for the libelant. The only question now remaining is as to the amount of the damages.

Presumptively, the amount of the damages is the sum which the libelant would have received from respondent for the space engaged, had it fulfilled its contract, less the amount actually received for said space from respondent and outsiders, under contracts made in mitigation of damages. Libelant is *prima facie* entitled to a decree for such damages against respondent.

The burden of showing that the amount of damages suffered by libelant is less than the substantial damages presumptively [337] sustained—or of showing that libelant suffered no damages at all is on the respondent.

The respondent's defense is that the libelant has suffered no damage because of absolute and insuperable disability on its own part to perform. If respondent is successful, libelant would be entitled to only nominal damages.

However, there was no absolute and insuperable disability on libelant's part to perform. If your Honor adopts libelant's construction of the contract, there certainly was no absolute and insuperable disability on libelant's part to perform, because the contract was carried out in accordance with the contract as libelant construed it. The libelant was, in fact, able to perform in July, and did load in July, and could probably have commenced earlier than it did, which negatives any alleged disability on libelant's part to perform. In that case libelant is entitled to a decree for the actual damages suffered.

Secondly, in case the Court adopts the respondent's construction of the contract and decides that it was libelant's imperative duty to begin and end loading (*a fortiori, to sail*) in June, and the facts show an absolute and insurmountable disability to begin and end loading in June, the libelant is entitled to a decree for nominal damages, and only nominal damages.

Third, in case the Court adopts respondent's construction of the contract to the extent of holding that it was libelant's imperative duty to begin loading in June, and the facts show a disability on libelant's part, the libelant would be entitled to a decree for actual damages suffered, if the delay in the beginning of the loading was caused by the respondent; or for [338] nominal damages only under the law, as your Honor has declared it, at that time and otherwise here, if the delay in the beginning of the loading was not caused by respondent.

The doctrine of the waiver of the anticipatory breach, upon which Mr. McCutchen and the other side rely so much, I think is a false quantity in this case, because in either way, it does not change the effect which I have stated.

I think I have consumed one hour now, and, if your Honor please, I will save my remaining time for answer to Mr. McCutchen's argument.

ARGUMENT OF EDWARD J. McCUTCHEN, ESQ.

Mr. McCUTCHEN.—If your Honor please, I think I shall take up the argument of counsel, or, rather, the points discussed by him in the inverse order.

This is a libel to recover, according to the terms of the libel, damages for a breach of a contract of shipment, the breach being alleged in very plain and unambiguous language to have occurred on the 23d and 26th days of June. I think I may be wrong about that. My impression is that the libel alleges that the two breaches occurred on the 24th and 26th days of June. However, it appears very clearly here that the two letters which were claimed to operate a breach of the contract, were received by the libelant on the 23d and 26th days of June. Whether those two letters contained language which would warrant an interpretation that they did amount to an anticipatory breach of the contract has been a subject of earnest discussion by counsel representing the respondent. Much might be said [339] in support of the contention that they did not contain that positive, unequivocal, unconditional

declaration of an intention not to perform, which must have existed in order that they could be construed or held to be an anticipatory breach of the contract.

I think for the purposes of the argument we can accept the contention which counsel makes in that respect and go without delay to other features of the case. Those letters, as I have said, were received on the 23d and 26th days of June. After they were in hand, they were replied to by the libelant, and replied to in no uncertain terms. It will not be necessary to read the letters, because there were two letters sent, one to the respondent, in Canada, and the other to the Ford Motor Company of San Francisco, and each of them set forth this telegram:

> "Referring to your contract with us, of date February 25, 1916, wherein you agree to ship 6200 tons 40 cubic feet each of automobiles and parts in packages at $47.50 per 40 cubic feet measurement, freight prepaid, since you have informed us, in your letters of the 14th and 24th instant that you will not deliver to us the 6200 tons which you agreed to deliver, we now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us, and hold you responsible for all

damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking a smaller quantity of automobiles than the quantity which you [340] contracted to deliver, we do not accept such smaller quantity as a full satisfaction of the contract of February 25, but only as the partial satisfaction which it, in fact, is."

Now, then, let us return for a moment to the last suggestion made by Dr. Hengstler:

"Assuming that libelant had waived the breach on June 26th or 28th, yet respondent was guilty of a breach on June 29."

Don't you mean June 27, Doctor?

Mr. HENGSTLER.—That the respondent was guilty of a breach on June 27.

Mr. McCUTCHEN.—The reason I asked that was, the language here is June 29. We will read that, then, as June 27.

"Had no 6200 tons ready and no intention to supply 6200 tons. This breach was anticipatory to performance by libelant which could properly begin on June 30."

Mr. HENGSTLER.—Mr. McCutchen, to clear up this question of June 27 and June 29, my point is that there was an anticipatory breach, and there was a continuing breach.

Mr. McCUTCHEN.—Yes.

Mr. HENGSTLER.—There was a breach at the time the libel was filed, and there was a continuing breach.

Mr. McCUTCHEN.—Yes. Now, I understand that to be upon the theory that it was the obligation of the respondent to deliver 6,200 tons of freight upon the dock before the 29th of June. Is that the contention, Doctor?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—That it is the contention that the respondent was compelled to deliver 6,200 tons of freight upon the dock on the 29th of June?

Mr. HENGSTLER.—Not at all. [341]

Mr. McCUTCHEN.—Then I do not think I get the point.

Mr. HENGSTLER.—That is not the contention.

Mr. McCUTCHEN.—I do not get the point.

Mr. HENGSTLER.—I do not know if there is room enough for 6,200 tons on the dock.

Mr. McCUTCHEN.—Now, what was the obligation of the respondent, so far as loading was concerned? That is to say, so far as supplying freight was concerned. Its obligation was that freight was to be delivered alongside steamer at San Francisco as fast as the vessel can load, and we have the unqualified statement of the manager of the libelant that it is extremely doubtful whether the vessel could have taken upon board a single package of freight during the month of June.

If the telegram of June 27 was an election to continue the contract in force, what was there in the conduct of the respondent after that which amounted to a renewal of the breach? Now, mind you, this is an action for breach of the contract brought before the time fixed for performance by the respond-

ent had arrived. Under the terms of the contract, assuming it to be susceptible of the interpretation which counsel puts upon it, the respondent had at least until the 11th of July to deliver the freight on the dock, because it was not until the 11th of July that the ship came back from the drydock, and on the 11th of July, or long before the 11th of July, the 1100 packages of freight which had been placed by respondent upon the dock, delivered into the possession of the libelant, was in the hands of the United States marshal, under a proceeding in rem, instituted by libelant.

Now, I hesitate to take up the time to argue to your Honor that it cannot be seriously contended, at any rate, that there [342] is no ground for the contention, that the respondent did anything after its letters of June 12 and June 24 that indicated to libelant that respondent did not intend to perform. Let us for a moment see what the situation was, if that is relied upon—and, by the way, it is not relied upon in the libel; I say the libel declares that the breach consisted in the writing of the two letters of June 14 and June 24. Now, to sustain the suggestion which I have named, that the ship could not have loaded any freight in June—

The COURT.—Before you pass beyond that last point, what effect, if any, would the advice to the railroad company not to load or not to deliver any freight have?

Mr. McCUTCHEN.—The advice to the railroad company was, "Until further instructions do not

deliver any more freight." That letter to the railroad company could not have been a continuing breach, as counsel claims it to be, because we were under no obligation to deliver freight at that time. The ship was not in a condition to receive it. We do not know, so far as this record is concerned, what the reason for that instruction was. It may very well have been that there was a strike of stevedores, and that there would have been great danger in piling up freight on the wharf. But there is nothing in that letter written to the railroad company which indicates that that was an instruction which was permanent, if I may use that expression. The letter says plainly and expressly "until further advised."

Mr. HENGSTLER.—Did you ever revoke it?

Mr. McCUTCHEN.—Counsel asks whether we ever revoked it. It makes no difference whether we revoked it. It was a communication to the railroad company; it was not a communication [343] to the libelant, and even if it had been a communication to the libelant, it would not have amounted to an anticipatory breach. Suppose we had written a letter to the libelant at the time that was written, and, by the way, it was written on the 22d of June, and the allegation is that deliveries were made on the 23d and 24th days of June, following the writing of that letter; there can be no doubt about that, as set forth expressly in the libel. Suppose we had written a letter to the libelant and it said, We have told the Southern Pacific that for the time being it is not to deliver any more freight

on the dock? Would that have amounted to a breach? The libelant can claim no more for that letter than if it had been addressed to the libelant; it was not addressed to the libelant, and it is extremely doubtful when the libelant knew of it. I think it might be taken as a foregone conclusion that that letter played absolutely no part in shaping the course which the libelant pursued.

Mr. Carter says, on the subject of ability to receive freight:

> "Normally, we could have discharged that cargo on the 27th, 28th and 29th, in time to commence loading on the 30th, but with this strike which had come up within a few days prior to the arrival of this ship, I am not at all certain that that could have been done.
>
> "Q. Are you in doubt about that?
>
> "A. Yes.
>
> "Q. On the morning of the 27th of June, and before this libel was filed, did you not know that the 'Cacique' could not take on a pound of freight, even up to the last minute of the last day of June? A. No.
>
> "Q. Did developments subsequently take place which satisfied [344] you that the ship could not take on any freight before the last minute of the last day of June? A. Yes.
>
> "Q. You say that you tried to discharge the cargo within these three days which we had if possible: What was it that induced you to try to discharge the cargo within those three days?

"A. For the reason that the Ford Motor Co. were to base their case, their argument with us, precisely on that point, and while I personally did not believe that position was correct, I at the same time wanted to avoid that point if possible."

I read from page 97 of the transcript.

"Q. You continued your effort to discharge the cargo, didn't you?

"A. Not beyond a very short—not beyond the very first day; I think by that time the split had occurred between us, and we knew it was impossible to go ahead at all."

Now, when had the split occurred?

"Q. And then you let up in your efforts to discharge the cargo?

"A. Yes; in other words, we did not do the work which we could have done had the dispute not arisen."

In answer to the interrogatories propounded shortly after the filing of the libel the witness stated under oath that had there been no strike, and competent stevedores available, the steamer could have been completely discharged before the 30th of June.

"Q. You say now that you let down in your efforts to discharge the steamer?

"A. Exactly. We could have secured more men had it been necessary, but in my opinion we could not have secured enough men to have completed that discharge in June, on account of this strike.

"Q. Then we may take it for granted in this case that with all the energy you could have displayed, you would not have been [345] ready to take freight on board that steamer before the end of June?

"A. Not with the steamer with clean holds; we could have commenced loading in her 'tween-decks, which had been discharged, which procedure I had considered."

He says that in order to comply with the port regulations, it was necessary to fumigate the vessels coming from an Oriental port, that this vessel was fumigated; that at the time she was fumigated there was no cargo on board, and that that was the usual course.

"Q. You did not know, then, at the time you filed the libel, that you could not load any freight in June?

"A. We did not know that it would be impossible to load freight, part of the cargo, in the 'tween-decks, for instance. I had despaired that we would be able to discharge the vessel with the men that we probably could get.

"Q. Were you in doubt on the 27th of June, when you filed this libel, that you would be able to load any cargo on the ship during the month of June?

"A. No; we expected to load part of it during the month of June.

Now, by the way, it should not be forgotten that on the 22d of June Mr. Moore wrote a letter to the Ford Motor Company here and to the Ford Motor

Company of Canada, stating that delivery of freight was to begin on the 27th of June and be completed by the 29th of June; and on the 23d and the 24th days of June these 1100 packages were delivered on the dock.

"Q. At the time you filed the libel?

"A. Yes.

"Q. How much did you expect to load during the month of June, at the time you filed the libel?

"A. Very little. My idea was that we could clean out possible two 'tween-decks of the vessel of the inward cargo, and load those 'tween-decks [346] with these Ford cars before June 30th, and establish this point of June loading.

"Q. Well, that would have been—without wanting to be offensive—just a piece of camouflage, wouldn't it?

'A. I have never seen it done before, and whether it would be effective, I am not at all sure.

"Q. That would, at most, taking your opinion of it, have been a pretense at performance, and that only, wouldn't it?

"A. I would hardly say that.

"Q. Well, it would not have been, in your opinion, as you look at it now, a genuine beginning of loading, would it?

"A. Do you mean legally, or actually?

"Q. No, I mean in your view of it, looking at it as a common sense proposition.

"A. It would be a genuine loading, provided you could have completed loading by doing so.

"Q. Don't you know that if you had tried anything of that kind your loading would have been delayed?

"A. Not necessarily delayed, but it is very probable that it would not have been increased.

"Q. Then if it could not have been increased, it would have been a pretense?

"A. Exactly."

Now, I will refer to it more extensively on another branch of the case. There was another reason, an insurmountable reason, why the failure to deliver freight there or all of the freight by the 29th of June could not have been a breach of this agreement. This ship went into drydock, and they knew it would have to go into drydock, and they had no right to put on board the ship a pound of this respondent's freight and then send the ship into drydock.

Mr. HENGSTLER.—Will you state why, as a matter of law? [347]

Mr. McCUTCHEN.—I have a case that seems to decide it very conclusively. I will call attention to that now.

Mr. HENGSTLER.—I will give you the case of the "Indrapura." That point is not involved here, because it could be done. There would be a custom to take cargo into a vessel and take the vessel into drydock after the cargo was on board.

Mr. McCUTCHEN.—You did not show any such custom.

Mr. HENGSTLER.—It was not necessary in this case.

Mr. McCUTCHEN.—But it was shown that if you had put any cargo on board you would have taken the ship into drydock with the cargo on board.

Mr. HENGSTLER.—I do not think the testimony shows that Mr. Carter knew he had to go to drydock.

Mr. McCUTCHEN.—That will break into my argument a little, but I will take that up right here. We could not get from Mr. Carter any very exact statements as to when Grace & Co. were advised of the condition of the ship, but he did go this far, that the captain undoubtedly advised Grace & Co. before noon of the 27th that the ship had been surveyed in Hongkong, and undoubtedly, as Mr. Carter says, delivered them a copy of the survey report. The ship did come here in a leaky condition. Whether Mr. Carter knew that it was leaky or not is beside this present question, but Mr. Carter, or someone connected with Grace & Co. must have known on the morning of the 27th that the ship was in a leaky condition. Now, that something occurred on the morning of the 27th of June, following this telegram of June 26th, which induced Grace & Co. to take a course different from that indicated in the telegram of the 26th of June, is almost a certainty. What could that have been? What could it have been? Now, [348] couple with that what we learned afterwards, what Grace & Co. must have known at the time, that this ship had been surveyed

in Hongkong, that she had been permitted to go on the voyage from Hongkong here only upon the theory that she could not carry oil in one of her tanks, that on the trip over here she sprung a leak, a leak in the forepeak—they might not have known at that time what caused that leak, but that they knew of the leak is to be taken, as I say, as an admitted fact in this case. At any rate, the Captain, their agent, knew of the leak. But it is inconceivable that the Captain would have gone to the office of Grace & Co. during the forenoon of the 27th of June and have not communicated to his employer the important information, in addition to the Hongkong survey, the important information that the vessel had sprung a leak in the forepeak. Now, that is the explanation, and the only explanation. That, coupled with the fact that Mr. Carter knew they couldn't load any freight in June, is the only explanation for this precipitate act on the part of the libelant. Having expressly told the respondent in this telegram of the 26th of June that it insisted upon performance and that it would take the 4075 tons of freight as part performance, which it, in fact, was—to use the language of the telegram—we are without any possible explanation of its change in front on the following day, except that it then knew that it could not take the freight on board, and that the vessel would have to go into drydock.

Now, Mr. Carter says they were very well advised of the position of Ford & Company; they had been advised of the position of Ford & Co. in the letter of June 1, addressed to them—not addressed

to Mr. Davis, addressed to Grace & Co., in which they [349] said: "We understand now you have taken out a clearance for this ship for the 5th of July. Now, we want you to understand that this contract calls for a sailing in June, and we do not propose to waive any of our rights in that respect." Now, as I say, Mr. Carter knew in the forenoon of the 27th of June that the ship could not load any freight, even up to the 1st of July. And he knew beyond that, and more important than that, that the ship could not take on any freight until she went into the drydock and returned to her dock. So, doesn't it seem idle to argue that we could not breach this contract, because we did not have all of our freight on the dock by the 29th of June? I do not know that it cuts very much figure in this case, but it might be worth while to call attention to the letter of June 28th, written by Grace to the respondent—by the way, it is a telegram—in which they say:

> "Please take notice that in accordance with our previous advices the steamship 'Cacique' was ready to load your cargo contracted for on February 25, 1916, on June 27, 1916, at nine P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of three thousand dollars per day commences on the day and at the hour last mentioned.

We know they were not ready to load at that time, so when counsel talks about the lack of good faith of this respondent, I must say I do not think

there is anything in the conduct of the respondent—

The COURT.—I will say frankly that they made a very good paper case on each side.

Mr. McCUTCHEN.—I was going to say that it might be said [350] in favor of the respondent that what it had to say it said. Now, this letter of June 28th states what is plainly and clearly not the fact; that ship was not ready to load any freight on the 27th of June.

Now, with reference to this letter to the Southern Pacific Company, which I say was written on the 22d, and we made these deliveries on the 23d and 24th, suppose that when that ship was ready to load there had been upon the dock the 4,075 tons called for by the telegram of the 26th, would it be contended for a moment that counsel could claim, as he is now claiming, that because of that instruction to the Southern Pacific that we were guilty of another breach?

Mr. HENGSTLER.—4,075 tons was not all that should have been there. There was 6,200 tons.

Mr. McCUTCHEN.—I do not claim they ever had 6,200 tons there, but I claim you told them they must deliver 6,200. So I say there is absolutely nothing in the conduct of the respondent that puts it in default; nothing, I mean, subsequent to these letters of June 14 and June 24, which puts it in default of performance of this contract.

Now, then, that being the situation, on the 27th this libel was filed, in which, as I stated, the alleged breach was the breach which was created by the writing of the two letters.

Going back for a moment to the notice with reference to the Southern Pacific delivery of freight, Mr. Carter testified to some facts with reference to that, and his testimony was stricken out, and he came back in the afternoon and took the stand again, and counsel asked him some further questions which your Honor permitted him to answer, and on cross-examination he was asked whether he complied with the demand of the Southern [351] Pacific which had been made upon him, and he said he did not. He said this first, he held these packages as freight, and when he was requested by the Southern Pacific Company to deliver them back he declined to deliver them back. He also testified on cross-examination that when he filed the libel on the 27th of June he had these 1,100 packages on the wharf as freight, and was holding them as freight, and when he filed his libel he made it a proceeding in part *in rem* against those 1,100 packages of freight on Pier 26.

I would have been glad to hear from counsel on the other side some explanation for that proceeding *in rem*. He has not given us any explanation, and, therefore, it is not possible to reply to his view with reference to that.

Mr. HENGSTLER.—I should like to hear your view, if you think there is anything unusual or suspicious about that proceeding.

Mr. McCUTCHEN.—No, I do not think there was anything unusual or suspicious, but I think it is perfectly clear that you had no proceeding *in rem* except against these packages as freight, and under

your contract of affreightment, you had no other right to hold them; you had no other right to decline the request of the Southern Pacific for the return of them, if such a request was made. I will ask you now, what right had you, your libel not then having been filed, to hold that freight?

Mr. HENGSTLER.—Do you want me to answer?

Mr. McCUTCHEN.—Yes, I will be glad to have you do so.

Mr. HENGSTLER.—In the first place, we did not hold it as freight, and, in the second place, we commenced a proceeding on foreign attachment. [352]

Mr. McCUTCHEN.—Now, counsel says in the first place he did not hold it as freight; that is entirely at variance and absolutely irreconcilable with the statement of his client. Is it necessary for me to go to the record and read that?

Mr. HENGSTLER.—That is a question of fact which the Court will decide from the whole testimony. I tried to clear up that remark with him once, and you objected to it. He might have inadvertently said so, but I think the whole testimony does not show that. That is for his Honor to decide. I think the testimony fairly shows that whatever there was on the wharf at that time was placed by the Southern Pacific on the wharf there by mistake.

Mr. McCUTCHEN.—I must say I do not find any testimony in the record to support that.

Mr. HENGSTLER.—It was never received by the libelant; it was on its wharf physically. They

had no right to take those 1,100 packages, under the circumstances existing.

Mr. McCUTCHEN.—Does that mean that you had no proceeding *in rem* against them at that time?

Mr. HENGSTLER.—It means that I had a proceeding on a foreign attachment against you.

Mr. McCUTCHEN.—That was all that you had?

Mr. HENGSTLER.—That was all.

Mr. McCUTCHEN.—I take that to be an admission that they were not entitled to proceed against the property *in rem* at that time.

Mr. HENGSTLER.—Oh, no; I did not make any admission like that. I said that I had a proceeding on a foreign attachment against you. I do not understand what is your point. A proceeding in foreign attachment is, to a certain extent, a proceeding [353] *in rem.*

Mr. McCUTCHEN.—But the unfortunate part of the position of counsel in that respect is that his foreign attachment has nothing to do with the portion of this property against which he proceeded *in rem.*

I am reminded that counsel said that his witness inadvertently said something. I am inclined to think that Mr. Carter would consider that a reflection upon himself. I think Mr. Carter considers himself quite an accomplished sea lawyer. He knows the rules that apply in matters of that kind; he knew just exactly what he was doing.

The COURT.—A sea lawyer and an admiralty lawyer are different things, aren't they?

Mr. McCUTCHEN.—I don't know, your Honor.

Mr. HENGSTLER.—Fortunately.

Mr. McCUTCHEN.—Mr. Carter did not make that answer inadvertently; he knew just the answer he was making. He made it twice. He made it first in answer to the question: "Didn't you when you filed this libel have that property in your possession as freight? A. Yes, we did.

"Q. And you proceeded to foreclose a maritime lien upon it? A. Yes, we did."

And again, when he was questioned about the information that had come from the Southern Pacific, and requested for a return:

"Did you comply with that request?

"A. No, I did not.

"Q. You kept the property? A. Yes.

"Q. And you proceeded to foreclose the lien on it? A. Yes."

Mr. HENGSTLER.—That is not all, is it?

Mr. McCUTCHEN.—No.

Mr. HENGSTLER.—I am willing to leave it to whatever the [354] testimony shows.

The COURT.—That is substantially his testimony.

Mr. McCUTCHEN.—Now, then, is it within the possibilities that this libelant could hold the property which it received as freight, and proceed against that property *in rem,* against which it would have an action of that kind, or a proceeding of that kind only under a contract of affreightment and then be permitted to say that it had prior to that time taken an advantage of an anticipatory

breach of this agreement by the respondent? If this libelant desired to take advantage of that anticipatory breach, it must have done it in such a way as to have left absolutely no doubt what its position was. Did it take action that left no doubt as to what its position was? Having demanded that the respondent should comply with the agreement, and having gotten into its possession 1100 packages of respondent's property under that agreement, it kept that property in its possession, and proceeded against it in this Court, not as would have been done if they had been seeking simply a personal judgment, in which case the 1100 packages of freight would not have been referred to in the title of the case, but proceeded against it under their contract of affreightment; they could not proceed otherwise. Now, if they intended at the time this libel was filed to treat this breach as anticipatory, was it not their duty to put the respondent back to where it was before it had made that delivery? Whatever may be said with reference to this phase of the case, they thought they had some advantage by reason of the fact that they had possession of the freight, and they proposed to maintain that advantage. Now, wouldn't that amount to, adopting your Honor's suggestion of the other [355] day, to killing a contract for one purpose and keeping it alive for another?

The utmost good faith on the part of this libelant would have required, as I stated, when it concluded to go back to these breaches, if they were breaches, of the 14th and 24th of June—good faith required

that it should have said to the respondent, "Come and take your freight." Good faith required that it should have said to the Southern Pacific Company, "Take this freight." But, instead of doing that, it denied to the Southern Pacific Company its request for the return of the freight, and it told the respondent that it insisted upon the performance of the contract.

I do not know that it is necessary to cite any law to your Honor on this subject, but I have two or three cases that I will make short quotations from.

Avery vs. Bowden, 5 Lel. & B. 714, was a case in which it appeared that the defendant chartered plaintiff's ship to sail to Odessa and there take a cargo, loading to be done within a certain number of days. When the vessel reached Odessa, the defendant's agent refused to supply one. The lay days had not expired. The master remained at Odessa and continued to demand a cargo. Before the lay days expired, war broke out between England and Russia, which rendered performance of the charter-party illegal. In a suit for breach of charter-party it was held that as the master had not accepted the renunciation of the charter-party, there was no actual failure of performance before war broke out, and that, therefore, defendant was discharged from the contract by the break of war. The Court said:

> "According to our decision in Hochster vs. De La Tour [356] (2 E. & B. 678), to which we adhere, if the defendant, within the running days and before the declaration of way,

had positively informed the captain of the 'Lebanon' that no cargo had been provided or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract; and thereupon, sailing away from Odessa, he might have loaded a cargo at a friendly port from another person; whereupon the plaintiff would have had a right to maintain an action on the charter-party to recover damages equal to the loss he had sustained from the breach of contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract; but, if it had been much stronger, we conceive that it could not be considered as constituting a cause of action after the captain still continued to insist upon having a cargo in fulfillment of the charter-party."

A leading case upon this subject which has been very generally approved, expressly approved by the Supreme Court of the United States, is Frost vs. Knight, Law Reports, 7 Exch. 111, the opinion in which was by Lord Cockburn. The action was for a breach of contract of marriage. The Court said:

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that

case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his [357] previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In Marks vs. van Eighen, 85 Fed. 853, the Court said:

" . . . if the latter elects"—that is, the injured party—"to treat the contract as terminated, his right of action accrues at once. The latter, however, must elect whether he will treat the contract as terminated, or as still existing."

Now, of course, the injured party in that case has but one election. These people, that is to say, the libelant, made its election.

Now, suppose there never had been any letters like those of the 14th and the 24th of June, would

anyone contend for a moment that an anticipatory breach of this contract was shown by the letter to the railroad company? And isn't that what it brings itself back to? By the refusal to set forth in the telegram of the 26th, the parties were placed back just where they were before the letters of the 14th and 24th of June were written and in order that the letter to the Southern Pacific Railroad Company could have constituted a breach, it must have amounted—and it must have gone to the libelant, too,—it must have amounted to an absolute refusal to perform the contract, [358] and it is not possible to give it any such interpretation. In considering whether it did amount to an anticipatory breach, your Honor would indulge every presumption in favor of the respondent. You might possibly seek for some reason for the writing of the letter, but it would not be necessary for you to do it. But if any genuine reason could have existed that would be presumed, even though the letter were not stronger than it is; but I think it is sufficient to say that that letter simply says that for the present you are not to deliver any further freight.

On this subject of anticipatory breach, I have on my notes, and I think there was cited to your Honor, when the preliminary proceeding was on, the case of Wells vs. Hartford Manila Co., reported in 55 Atlantic, at page 599; I shall read from page 602. The case is a Connecticut case:

> "These limitations contained in the rule prevent a party to a contract from occupying an equivocal position with respect to it. The par-

ties have mutually elected to treat it otherwise, and given unmistakable evidence of such an election. A renunciation does not create a breach. There must be an adoption of the renunciation."

And again, as bearing upon this Southern Pacific matter, if it is claimed to be a renunciation, "the renunciation must be so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question."

Mr. HENGSTLER.—I should like very much for you to read that letter of the 22d, because I think that letter clears up one of the contentions made.

Mr. McCUTCHEN.—Yes. That letter is—counsel read a lot [359] of the matter that was on the letter-head that does not have anything to do with this letter:

"Confirming our telephone conversation of recent date, until you are authorized to do so please do not under any circumstances deliver any of the cargo at present on hand booked steamer 'Cacicue' to W. R. Grace & Co."

Mr. HENGSTLER.—You notice, "at present on hand" belongs together.

Mr. McCUTCHEN.—Yes. That suggests a question to me: Do you claim that that affected the 1100 packages that had been delivered?

Mr. HENGSTLER.—No. I claim that it does not mean what I think you contend for, that it was intended to express the idea, "do not deliver any o

this cargo at present." It means nothing of that sort.

Mr. McCUTCHEN.—Now, I had not intended to cite these cases. In view of what I said with reference to counsel's contention regarding the letters of June 14 and June 24, and in view of his attitude with reference to this railroad letter, I will read them:

In Roehm vs. Horst, 178 U. S., page 1, it is said:

> "We think that there can be no controlling distinction on this point between the two classes of cases"—that is to say, one for an anticipatory breach and one for an actual breach, with reference to certain claims—"and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the [360] contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties."

In Dingley vs. Oler, 117 U. S. 490, referring to the communication there, the Court says:

"It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs."

Again in the same case:

"This, we think is very far from being a positive, unconditional and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning."

Again, in M'Bath vs. Jones Cotton Co., 149 Fed. 383, it is said:

"To justify a cancellation of a contract for purchase of so many bales of cotton of a certain type or quality before the time for delivery by the seller has passed, upon the ground of a tender of cotton not receivable, the purpose of the seller to make no other tender and to stand irrevocably upon the tender of delivery made must be absolute and unmistakable. There must be no *locus penitentiae*." [361]

In 13 Corpus Juris, 654, which is supported by the citation of numerous authorities, it is said:

"In order that the rule may apply, the renunciation must cover the entire performance to which the contract binds the promisor.

> "MUST BE DISTINCT AND UNEQUIVOCAL. The renunciation must be absolute and unequivocal; a mere expression of intention not to perform is not enough, but no precise form of words is necessary. The obligation of the contract being created, a denial of its existence is equivalent to a repudiation or renunciation of liability under it."

In Marks vs. Van Eighen, a case which I cited to another point, the Court said:

> "The action cannot be maintained when the evidence to prove a renunciation of the contract is equivocal or indeterminate."

Now, even though there had been or was an anticipatory breach, the question then arises, was libelant able to perform the contract of February 25th according to its terms? Counsel makes a very ingenious, and, indeed, a very interesting argument on the question. What does that contract mean? The clause of the contract with which we are concerned, opposite the word "shipment," reads, "Per American steamship 'Cacicue' June loading."

He lays some stress upon the fact that there is no comma in the original contract between the word "Cacicue" and the word "June," and I really do not think that that makes any difference. However, his contention is that what was meant by this contract was that the shipment was to be made on the "Cacicue" when she returned from her voyage to the Orient. Now, how [362] easy it would have been to say that. How easy it would have been to say that as soon as the "Cacicue" got back from

her Oriental voyage the loading should take place.

Now, suppose you had those two things side by side, on the one hand you had the words "Shipment per American steamship 'Cacicue' June loading," and on the other side you had opposite the word "shipment," "the loading to begin as soon as the steamer returns from its Oriental voyage," would anybody contend that they meant the same thing? Yet, isn't that the contention of counsel on the other side now?

The words "June loading" have not any hidden meaning. They are perfectly plain. Anybody would understand what those words meant. I take it that no one would question for a moment that used in another contract they meant that the loading should take place in June and that the entire loading should take place in June.

Mr. HENGSTLER.—Are you sure about that in law, Mr. McCutchen?

Mr. McCUTCHEN.—You may have some law on the subject, of which I am not advised, but I would not think there would be any question about that. That would seem to me to be perfectly plain. But counsel says these parties were not contracting with reference to a June loading. The telegram of the 23d, or, I think it was the 22d—and I might say in passing that Mr. Davis acted upon telegrams and letters, and says that he showed those telegrams and letters to Grace & Co., which would have been a very natural thing for him to do, because Mr. Moore wanted to know whether he had authority—he was not in the office of the Ford Motor Company of

Canada, Ltd., and, naturally, Grace & Co. knew that his authority was special [363] and limited, and that he could not do anything beyond what he was authorized to do. What did the respondent want? After referring to certain shipments that were to go forward or had gone forward—no, they were to go forward in April and May—they said to Mr. Davis, or to the Ford Motor Company of San Francisco, "Would like another 4000 tons of May and June sailing offer $47.50." Now, is it possible to argue in the face of that that they were not concerned with the time when this freight should go forward? What did Mr. Davis reply? In his reply of the 24th of February he said, "Can get 6200 tons by steamship 'Cacicue' for early June." Early June, why? Clearly, early June sailing. That is what the Ford Motor Company of Canada wanted.

After it had been advised by telegram that space had been reserved, still treating the date of sailing as important, they said, "Let us know the dates on which the shipments are to sail," and to that Mr. Davis replied "About the 24th of June."

Now, under those circumstances this contract was drawn; it was drawn by Grace & Co. without any consultation as to the language to be employed with Mr. Davis or anybody representing the respondent. It was the language of Grace & Co. from beginning to end.

Now, unless there is some ambiguity in this contract with reference to the words "June loading," those words are to be accepted and interpreted according to their ordinary meaning. I submit that

there is not anything in this record showing that these words "June loading" do not mean what those words ordinarily would mean. Mr. Carter testified in answer to a question put to him by your Honor, "What are those words understood to mean [364] among shipping men," that the words meant that the loading was to begin in June.

He was asked later as to whether he wished to be understood as saying that that meant that the loading could begin on the last minute of the last day of June, and he said that was a point that was very much discussed among shipping men; by the most liberal rule of interpretation that could be applied to Mr. Carter's testimony, it does not appear that that expression or those words have been interpreted by the shipping community to mean that the loading may begin on the last day of June. Now, what was it that was debated, that had long been the subject of debate among shipping men; whether that loading could begin on the last day of June, and whether a loading which began on the last day of June would save the rights of the carrier under the contract. Now, in order that those words can have any different meaning as the result of some custom, that custom must have been generally understood and recognized, and there is no showing here that the custom was either so understood or recognized.

In Clarke vs. Blue Licks Springs Co., 184 Ky. 827, but I read from 5 A. L. R. 234, that case was a proceeding to recover a balance alleged to be due under a contract to drill a well. Part of the controversy arose over the true meaning of the word "reaming,"

as found in the contract. Webster's definition of the word was—"to widen the opening of a hole; to enlarge or dress out a hole with a reamer."

The plaintiff, while admitting that that was the proper definition of the word, contended that a custom prevailed among well drillers which enlarged the meaning of the word, so as to include within the term all of the depths of the larger hole made after passing [365] the bottom of the smaller one being reamed. For illustration: If a 5-inch hole extends the depth of one hundred feet, and it is desired to ream it so as to make an 8-inch hole, and the latter dimensions are continued after passing the bottom of the 5-inch hole, the entire distance of the 8-inch hole is properly considered as reaming.

The Court said:

> "In the first place, it is perfectly plain that the alleged customary definition is directly contrary to the meaning of the word as given by Mr. Webster, and for it to prevail, and be allowed to affect the contract and the rights of the parties, it must be shown that the alleged custom through and by which it is done must either have been known and understood by the parties at the time of entering into the contract, and that the contract was made with reference to it, or the custom must have been of such universal use as that it would be presumed to have been known by the parties. . . .
>
> "No such customary meaning of the word is shown to have existed in that community. It is true that plaintiff testified to the existence of

such a custom among well drillers, and introduced a witness who testified as to the custom prevailing among drillers of oil wells in communities far removed from the vicinity where the well involved here was being drilled; but neither of them attempted to say that any such custom prevailed in that vicinity. Besides, a number of witnesses, some of whom were well drillers in the immediate vicinity, testified to the contrary, and further said that the only 'reaming,' as used in the contract, meant only the enlargement of a smaller hole to its bottom, and that the reaming ceased when the bottom of the small hole was reached, although the larger hole was [366] *reached, although the larger hole was* continued on below that point.'"

In The Gualala, 178 Fed. 402, the Circuit Court of Appeals of this circuit quoted approvingly from the decision of the Supreme Court of the United States, as follows:

"A usage, to be binding, should be definite, uniform and well known. It should be established by clear and satisfactory evidence so that it may be justly presumed that the parties had reference to it in making their contract."

The COURT.—I dislike to interrupt you, Mr. McCutchen, but you have had your hour and a quarter.

Mr. McCUTCHEN.—Very well, your Honor. Will your Honor let me cite the case—

The COURT.—You may file a memorandum of

any authorities you wish to, in addition to your oral argument.

Mr. McCUTCHEN.—Very well. I wanted to read your Honor one case on the subject of sending a vessel to drydock with cargo on board.

Mr. HENGSTLER.—Is that the "Indrapura" case?

Mr. McCUTCHEN.—Yes.

Mr. HENGSTLER.—You know there are two phases to that case. I suppose your Honor is familiar with it.

The COURT.—I am quite familiar with the name, and probably can find it. Give me the citation and I will look it up.

Mr. McCUTCHEN.—The one that I have here is 171 Federal, 929.

Mr. HENGSTLER.—That came up in another phase later on, your Honor.

The COURT.—Doctor, you have reserved a portion of your time, and I will hear from you now if you have anything further [367] to say.

CLOSING ARGUMENT OF L. T. HENGSTLER, ESQ.

Mr. HENGSTLER.—If your Honor please, I will confine myself to this question of waiver of the breach. I have the authorities on our side noted in the memorandum which I handed to your Honor, which show that in this case there was no waiver of the breach. The particular case I desire your Honor to consider in this connection is the case of Tri-Bullion Smelting and Development Co. vs. Jacobsen, Circuit Court of Appeals, Second Circuit,

233 Federal, 646. That was an action to recover damages for breach of contract to sell the output of zinc concentrates during a term of two years. After a year and a half the defendant refused to make deliveries, claiming that it was released, and on July 7, 1913, so notified the plaintiff. On July 8th, Jacobsen, the plaintiff, wrote the defendant stating that if it did not immediately resume shipment he would purchase the goods in the open market and hold the defendants for the difference in prices. I quote from the opinion:

> "The theory of Tri-Bullion seems to be that because, in the letter of July 8th, Jacobsen urged Tri-Bullion to proceed to fulfill the contract, he was thereby precluded from bringing action for an anticipatory breach but must perform all of the provisions of the contract called for on his part, one of which was to pay the amount thereafter due for ore theretofore delivered and that Jacobson could sue only for failure to deliver any installment as the installment became due month by month.
>
> "(1) The question of fact in the trial court was whether Tri-Bullion had breached its contract. Both parties having moved for the direction of a verdict, and the court having directed a verdict in favor of plaintiff, that question is disposed [368] of by the verdict, and what the verdict amounts to is a finding that Tri-Bullion broke its contract, and it matters not whether the breach was actual or anticipatory. Wilson vs. Knowles, 213 Fed. 782,

130 C. C. A. 440; Reis vs. Rosenfeld, 204 Fed. 282, 122 C. C. A. 480; United States vs. Two Baskets, 205 Fed. 37, 123 C. C. A. 310; Allegheny Valley Brick Co. vs. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189.

"(2) Viewed, however, as an anticipatory breach, the action of Jacobsen in writing the letter of July 8, 1913, insisting that Tri-Bullion should carry out his contract, did not, in any manner, cure such anticipatory breach by Tri-Bullion. The persistent position of Tri-Bullion was that it was excused by the force majeurs clause—an obvious pretense to avoid the obligations of a contract which had become unprofitable. Jacobsen's letter of July 8th, as the District Judge said, 'was an ordinary business letter in which the plaintiff said in substance: 'You ought to perform your contract, and I request you to do so; but, if you do not, I will enter the market, buy zinc concentrates, and hold you for the difference between the cost to me and the contract price.' "

"Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out, failing which such other party states he will be compelled to purchase goods in a rising market."

There are cited as authorities to this last holding of the Court the cases which Mr. McCutchen has cited to your Honor on the [369] other side, Roehm vs. Horst, 178 U. S. 1; and particularly Marks vs. Van Eeghen, 85 Fed. 853.

There is little confusion about this matter of waiver of an anticipatory breach; if one party to a contract has breached that contract, the contract is not dead; the other party can still say, "I want my remedies for your breach of the contract"; and claiming to insist upon remedies for the breach of the contract, such as demurrage and other remedies, is not a waiver of the contract.

Under the principles announced in the authorities cited, including the Tri-Bullion case, it is clear that in the case at bar there was no waiver by W. R. Grace & Co. of its claim that the contract had been breached by the respondent.

On June 24, 1916, the respondent repudiated the contract. On June 26, 1916, the libelant sent a telegram to the respondent in which it stated: "We do not in any way release or waive any claim for damages or demurrage due to your breach of contract." This language refutes any claim that libelant waived or intended to waive the respondent's breach by writing that letter.

On June 27, 1916, the libelant commenced this action, alleging breach of the contract. What stronger evidence to negative any intent of waiver could be produced than the fact of the commencement of this action by libelant?

The case of Marks vs. Can Eeghen, cited by the other side, from the Circuit Court of Appeals of the Second Circuit, contains the following:

> "In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of the action."

On June 28, 1916, libelant notified respondent by telegraph [370] that the vessel was ready to load on June 27th, and that demurrage commenced to run by reason of the failure of respondent to deliver the cargo alongside as fast as the vessel could be loaded. There was nothing in this telegram which would make a stronger case of waiver than was there in the letter written by Jacobsen in the Tri-Bullion Smelting & Development case, wherein he said:

> "You ought to perform your contract, and I request you to do so; but if you do not, I will enter the market, buy zinc concentrates and hold you for the difference between the cost to me and the contract price."

The Circuit Court of Appeals held that that letter did not in any manner cure such anticipatory breach by the Tri-Bullion.

It should also be kept in mind that the telegram of June 28th was sent after the libelant had filed its libel declaring on the breach of contract, and seeking to recover damages for the same, and that the

rights of the parties had then become fixed for the purposes of this action.

Much has been said by the other side about exact dates pleaded in the libel, and that we are tied down to June 22, or June 24, or June 26, because the libel says so—

The COURT.—I suppose everybody will agree that the breach must have preceded the filing of the libel.

Mr. HENGSTLER.—Yes, your Honor, that the breach must have preceded the filing of the libel. I claim that the breach preceded the filing of the libel, and that the breach continued right down even to the moment when the libel was filed. We are not tied down even to this anticipatory breach; that it appears from the evidence that at the time the libel was filed—

The COURT.—No after breach would support this libel, [371] would it?

Mr. HENGSTLER.—No. I will rest on the breaches down to the time of the filing of the libel.

Now, this question of variance is a very important question at common law, but I want to call your Honor's attention particularly to the fact that all these reliances upon exact dates when this anticipatory breach happened do not count for anything in admiralty.

In Dupont vs. Vance, 19 Howard, 173, which is a leading case on this subject, libelant sought to recover damages for failure to deliver a shipment of goods. The proof showed jettison caused by peril of the sea, and the Court allowed recovery of a gen-

eral average contribution. In discussing the question of whether the pleadings were in such form as to present the claim for contribution, the Court held:

> "The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libelant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the Court as is suited to the action, whether *in rem* or *in personam*.
>
> "It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defense, either in part or in whole, to the case made by the libel.
>
> "The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance, or departure in pleading, like [372] those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because that entire case is not distinctly stated in the libel."

And no one could claim that anyone could be surprised here, because whatever was done with reference to breaches, or anticipatory breaches, was done by the other side; they knew better than we possi-

bly could know. We only have found out many of the facts by this correspondence which was produced here in court at the trial.

In The Gazelle and Cargo, 128 U. S. 474, upon appeal to the Supreme Court it was held:

> "The charterers, having detained the vessel by their persistent refusal to order her to such a port as was described in the charter-party, the master, as he had a right to do, treating the charter-party as still existing, filed successive libels, claiming demurrage accruing under it, until the charterers filed a cross-libel, contending that the master (who had only maintained the just rights of the owners) had committed a breach of the charter-party.
>
> "It is further contended that the Court erred in awarding as damages the whole freight, amounting to $3,285.60, under libels claiming only demurrage and expenses to the amount of $2,470.20. But those libels set forth all the material facts ultimately found by the Court, and each libel contained a prayer for general relief.
>
> "In the Courts of Admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as [373] at common law; and if a libelant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate

> relief (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded), the Court may award any relief which the law applicable to the case warrants."

The above case was quoted and followed in Davis vs. Adams, Circuit Court of Appeals of this Circuit, 102 Federal, 520, in which the Court, on appeal, allowed the libelant to amend his libel substituting a claim for wages for one of damages sustained for forced detention, the Court holding:

> "The Court below, in its opinion, states, in effect, that the appellant has a meritorious case upon the facts proven, but denies his right to recover because of the character of his pleading. This is a technical defect merely, and under the authorities above cited the Court should not allow mere technicalities to overthrow the principles of equity, and defeat the ends of justice."

These cases are binding upon this court with reference to that question.

As far as the principles of equity and the ends of justice are concerned, if your Honor please, it seems to me that in this case, which rests upon the language " 'Cacicue' June loading," and in the light of the construction which the parties, themselves, and particularly the other side, gave to it, and in view of the fact that they not only did not insist upon the loading being in June, but hailed with delight as a life saver that probably the loading would not be in July, it would be but just to construe these

words by giving them the meaning, "'Cacicue's' June loading"—"Cacicue" with an apost*h*rophe "s"— [374] rather than the meaning, "'Cacicue' warranted June loading," a meaning these people never thought of until June, when they could not possibly carry out their contract and had to find some means of getting out of it.

The COURT.—The matter will be submitted.

Mr. McCUTCHEN.—Within what time, your Honor, shall we hand you our memorandum?

The COURT.—As early as you can.

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [375]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD. a Corporation, et al.,

Respondents.

(Opinion and Order Dismissing Libel.)

ANDROS & HENGSTLER and GOLDEN W BELL, Esq., Proctors for Libelant.

McCUTCHEN, WILLARD, MANNON & GREENE and W. F. WILLIAMSON, Esq. Proctors for Respondent.

This is an action *in rem* and *in personam* for breach of contract to furnish cargo for one of libelant's vessels.

On February 25th, 1916, libelant and respondent entered into the following written contract:

"San Francisco, February 25th, 1916.

"Ford Motor Company,

"San Francisco, Cal.

"Gentlemen:

"Attention Mr. L. C. Davis.

"We confirm freighting engagement as follows:

"COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

"RATE: $47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date. [376]

"SHIPMENT: Per American S. S. 'Cacique' June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

"DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3,000.00 per day.

"Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

"Yours very truly,

"W. R. GRACE & CO.

"(Sgd.) H. E. MOORE,

"Traffic Manager.

"Accepted:

"(Sgd.) FORD MOTOR CO. OF CANADA, LTD.

"By L. C. DAVIS."

As the Court construes this contract, it fixed June as the time at which the "Cacique" should load the cargo of 6200 tons agreed to be furnished by respondent. Libelant was at all times willing and eager to carry out the contract, while respondent was not willing to furnish more than 4075 tons of the 6200 tons contracted for, and on June 14th advised libelant that "4075 tons is the entire cargo that we will furnish for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding on this Company for 6200 tons space, and attempt to hold this 4075 tons cargo for Freight for 6200 tons at the above rate, we will decline to load any of the cargo whatever."

To this notification libelant replied: "We now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and always have been ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us, and hold you responsible [377] for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking a smaller quantity of automobiles than the quantity which you contracted to deliver, we do not accept such smaller quantity as a

full satisfaction of the contract, but only as a partial satisfaction which it in fact is."

On June 22d libelant informed respondent that delivery of freight was to begin on June 27th and be completed by June 29th. On June 27th, however, the "Cacique" as not ready to take on cargo, and could not have been made ready to do so. The contract did not permit libelant arbitrarily to fix a date for the delivery of freight, but required only that freight "be delivered alongside the steamer at San Francisco as fast as vessel can load."

This action was commenced on June 27th, at which time there had been no actual breach of the contract on the part of respondent for the reasons: 1. that the vessel was not at that time in condition to load; and, 2. there were 1100 pieces of respondent's freight on the wharf which libelant treated as having been delivered in part fulfillment of the contract, and notwithstanding the notice that delivery of freight should begin on June 27th, and be completed by June 29th, respondent was required by the contract to deliver only as fast as the vessel could load. As there was, therefore, no actual breach of the contract before the filing of the libel, which indeed was filed before performance was due, the action, if maintainable at all, can only be maintained upon the theory that there was an anticipatory breach committed by respondent when it notified libelant that it would furnish only 4075 tons of freight, and insisted that the amount so furnished should not be held by libelant for the 6200 tons contracted for. There is, of course, [378] no doubt that an action

may be maintained for a breach of contract upon a distinct notification by one of the parties that he will not perform an executory contract such as this, even though performance be not due at the time of such notification, the notification being regarded as an anticipatory breach, but the party aggrieved by such anticipatory breach may not thereafter accept a part performance under the contract, and still maintain his action upon such anticipatory breach, and before performance is due. In the instant case, by filing its libel *in rem* against the 1100 pieces of freight on the pier libelant, despite its present protests, elected to accept such 1100 pieces as part performance of the original contract. It could have no action *in rem* against them unless delivered and received as freight under the contract. As bearing upon this proposition the testimony of Mr. Carter, libelant's manager, who had charge of the transaction is of interest.

"Q. So that you knew at that time that the Ford Motor Company had actually delivered 1100 packages, or thereabouts, of the freight which you in this telegram of the 26th of June demanded it should deliver? A. Yes, but also knew it was delivered by mistake. Q. That is, it was not intended as freight for the steamer? A. No, it was not the intention of the Ford Motor Co. to give us that freight. Q. And it was not received by you as freight? A. It was received as freight. Q. It was received as freight? A. It was received as freight. Q. Then you had it as freight? A. We did. Q. And you thereafter, as set forth in this libel verified by you, proceeded to

foreclose a maritime lien upon the 1100 packages of freight. A. Yes. The railroad at that time was requesting us either, as I remember it, to return or permit them to take away that cargo; they claimed they had made an error in delivering it [379] to us; we naturally, when we placed our libel, libeled everything we could find of Ford. * * * Q. You did not comply with any request of the Southern Pacific Company on that subject, if any such was made to you? A. No, we did not. Q. But you proceeded two days after that to foreclose a maritime lien upon those packages, didn't you? A. Yes."

While it is true that respondent endeavored to have this freight retaken into possession by the Railroad Company that had delivered it, yet this fact is not very material in view of the action of libelant as disclosed by the above testimony and by the course pursued by it in proceeding against the packages *in rem* as against freight in its possession as such. We have then an action for breach of contract commenced before performance was due, based upon a claimed repudiation of the contract, but which repudiation was not accepted by libelant as such, because it held 1100 packages as freight delivered in pursuance to the contract after such repudiation, and proceeded to foreclose a maritime lien against it as such in the very action based upon such repudiation. But if we regard the letters and conduct of respondent as a repudiation of the contract, libelant could only maintain an action thereon by accepting them as such. It could not for one purpose hold the contract as broken, and for another regard it as in

process of being performed. It could not before performance was due maintain an action as for an anticipatory breach of the contract, and in the action itself proceed *in rem* against freight that could not be held as such unless delivered under and in part performance of the same contract. It is true that in the Admiralty an action will sometimes be sustained even though prematurely brought, where there is some good reason for doing so. But where as here performance was not due at the time the action was commenced, where performance of at least a substantial portion of the contract was offered by [380] respondent, and where there is a very grave question as to whether libelant itself was or would be in a position to carry out its portion of the contract, however willing to do so, I do not think that justice requires, or indeed will permit the maintenance of the action upon an anticipatory breach, unless when the libel was filed such breach would sustain it. During the argument of the case the following colloquy occurred between the Court and libelant's counsel:

"The COURT.—I suppose everybody will agree that the breach must have preceded the filing of the libel?

"COUNSEL.—Yes, your Honor, that the breach must have preceded the filing of the libel. I claim that the breach preceded the filing of the libel, and that the breach continued right down to the moment when the libel was filed. We are not tied down even to this anticipatory breach; that it appears from the evidence that at the time the libel was filed—

"The COURT.—No after breach would support this libel would it?

"COUNSEL.—No. I will rest on the breaches down to the time of the filing of the libel."

At the time the libel was filed the breach relied upon could not support an action for the reasons hereinbefore stated. At that time the libelant had suffered no injury and respondent was still entitled to perform its agreement. Whatever rights may have later accrued to libelant, or whatever injury, if any, it may have later suffered, when this action was commenced it was still uninjured, and for this reason the present libel must be dismissed.

March 1st, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 1, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [381]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,

Claimants.

Final Decree Dismissing Libel.

This cause having come on duly to be heard and having been heard on the 15th, 16th, 17th and 22d days of November, 1920, in the above-entitled court, the libelant appearing by its proctor Louis T. Hengstler, Esq., and respondent and claimants appearing by their proctors, W. F. Williamson, Esq., Edward J. McCutchen, Esq., and Farnham P. Griffiths, Esq., and testimony oral and documentary having been taken and the cause having been heard on the pleadings and proofs and having been argued and submitted by the proctors for the respective parties, all in open court on the said days, and due deliberation having been had in the premises, and the Court having filed its opinion herein with findings as therein stated and ordering that the libel must be dismissed:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the said libelant take nothing by its said libel and that the libel [382] be dismissed and that respondent and claimant Ford Motor Company of Canada, Ltd., and claimant, Robert Nettlefold, do have and recover from libelant their costs to be taxed, with interest on said costs at the rate of six (6) per cent per annum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that if this final decree and judgment for costs as above shall remain unsatisfied for

ten days after the entry hereof and notice to the proctor for libelant, then unless an appeal be taken from this decree within the time limited by law and by the rules and practice of this court, the sureties or stipulators for costs on the part of libelant do cause the engagement of their stipulation for costs to be performed, or show cause within four days why execution should not issue against them, their lands, goods and chattels, according to their stipulation, to enforce satisfaction of this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that unless an appeal be taken from this decree within the time limited by law and the rules and practice of this Court, the claimants' stipulation for costs and for the release of the property herein seized under process *in rem* and under the writ of foreign attachment heretofore issued herein, be cancelled and the stipulators thereon exonerated and discharged.

Dated: April 11, 1921.

M. T. DOOLING,
District Judge.

Signed at San Francisco, May 3d, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Entered in Vol. 10 Judg. and Decrees, at page 420.

Filed Apr. 13, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Filed May 4, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [383]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Claimants.

Notice of Appeal.

To Ford Motor Company of Canada, Ltd., a Corporation, Respondent and Claimant, Robert Nettlefold, Claimant, and to W. F. Williamson, Esq., Messrs. McCutchen, Olney & Willard, Ira A. Campbell, Esq., Messrs. Pillsbury, Madison & Sutro, Farnham P. Griffiths, Esq., and Messrs. McCutchen, Willard, Mannon & Greene, Their Proctors; and to the Clerk of the District Court of the United States for the Northern District of California:

You and each of you will please take notice that the libelant above named hereby appeals to the United States Circuit Court of Appeals for the

Ninth Circuit, from the final decree of the District Court of the United States for the Northern District of California, filed and entered herein on the 4th day of May, 1921.

Dated: San Francisco, California, May 26, 1921.

ANDROS & HENGSTLER,
Proctors for Libelant. [384]

[Endorsed]: Receipt of a copy of the within notice of appeal is hereby admitted this 26th day of May, 1921.

W. F. WILLIAMSON,
PILLSBURY, MADISON & SUTRO,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

Filed May 26, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [385]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO.,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,

Claimants.

Assignment of Errors.

Libelant above named assigns errors in the proceedings and decree of the District Court as follows:

I.

The District Court erred in its construction of the contract of February 25th, 1916, between respondent Ford Motor Company of Canada, Ltd., and libelant.

II.

The District Court erred in construing said contract as meaning that it fixed June as the time at which the "Cacicue" should load the cargo of 6200 tons agreed to be furnished by respondent.

III.

The District Court erred in finding that, on June 27th, 1916, there were 1100 pieces of respondent's freight on the wharf which libelant treated as having been delivered in part fulfillment of the contract. [386]

IV.

The District Court erred in finding that the pieces of respondent's freight on the wharf were treated by libelant as having been delivered in part fulfillment of the contract.

V.

The District Court erred in finding and deciding that, by filing its libel *in rem* against the 1100 pieces of freight on the pier libelant elected to accept such

1100 pieces as part performance of the original contract.

VI.

The District Court erred in deciding that libelant could have no action *in rem* against the 1100 pieces of freight on the pier unless delivered and received as freight under the contract.

VII.

The District Court erred in deciding that the fact that respondent endeavored to have the 1100 pieces of freight retaken into possession by the Railroad Company was not very material.

VIII.

The District Court erred in finding that libelant proceeded against the packages *in rem* as against freight in its possession as such.

IX.

The District Court erred in finding and deciding that respondent's repudiation was not accepted by libelant as such.

X.

The District Court erred in finding that libelant held 1100 packages as freight delivered in pursuance to the contract after such repudiation.

XI.

The District Court erred in finding and deciding that libelant proceeded to foreclose a maritime lien against 1100 packages as [387] freight delivered in pursuance to the contract after repudiation.

XII.

The District Court erred in finding and deciding that libelant proceeded *in rem* against freight de-

livered under and in part performance of the contract.

XIII.

The District Court erred in deciding that performance was not due at the time the action was commenced.

XIV.

The District Court erred in finding that there was a very grave question as to whether libelant was or would be in a position to carry out its portion of the agreement.

XV.

The District Court erred in deciding that there was no actual breach of the contract on the part of respondent on June 27th.

XVI.

The District Court erred in not holding and deciding that, when the libel was filed, an anticipatory breach would sustain the action.

XVII.

The District Court erred in not deciding that justice required the maintenance of the action upon an anticipatory breach.

XVIII.

The District Court erred in deciding that, at the time the libel was filed, the breach relied upon could not support an action.

XIX.

The District Court erred in not deciding that, at the time the libel was filed, the breach did support an action.

XX.

The District Court erred in deciding that, at the time the libel was filed, the libelant had suffered no injury. [388]

XXI.

The District Court erred in not deciding that the action should be sustained upon rights which accrued to the libelant after the filing of the libel.

XXII.

The District Court erred in not deciding that the action should be sustained upon injuries which libelant suffered after the filing of the libel.

XXIII.

The District Court erred in ordering the libel to be dismissed.

XXIV.

The District Court erred in decreeing that the libelant take nothing by its libel.

XXV.

The District Court erred in decreeing that respondent and claimant Ford Motor Company of Canada, Ltd., and claimant Robert Nettlefold, do have and recover from libelant their costs to be taxed, or any costs.

XXVI.

The District Court erred in not ordering and entering a decree in favor of libelant, in accordance with the libel on file herein.

ANDROS & HENGSTLER,
Proctors for Libelant.

[Endorsed]: Receipt of a copy of the within assignment of errors is hereby admitted this 26th day of May, 1921.

W. F. WILLIAMSON,
PILLSBURY, MADISON & SUTRO,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

Filed May 26, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [389]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Claimants.

Stipulation (and Order Regarding Certain Original Exhibits).

IT IS HEREBY STIPULATED that in making

up the apostles on appeal of the above-entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the original exhibit attached to the return of the Southern Pacific Company to the citation and order for foreign attachment and the original exhibit attached to the answers of the libelant to respondents' interrogatories herein may be filed in said United States Circuit Court of Appeals, and that copies of said exhibits need not be included in the apostles on appeal.

Dated: June 23d, 1921.

ANDROS & HENGSTLER,
Proctors for Libelant.

W. F. WILLIAMSON,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

It is so ordered.

WM. W. MORROW,
Circuit Judge. [390]

[Endorsed]: Receipt of a copy of the within stipulation is hereby admitted this 23d day of June, 1921.

W. F. WILLIAMSON,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

Filed Jul. 14, 1921. W. B. Maling, Clerk. By

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing 391 pages, numbered from 1 to 391, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the cause entitled W. R. Grace & Co., a Corp., Libelant, vs. Ford Motor Company of Canada. Ltd., a Corp., et al., Respondents, No. 16,058, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein), and the instructions of the proctors for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of One Hundred Fifty-four Dollars and Fifteen Cents ($154.15), and that the same has been paid to me by the proctors for libelant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of July, A. D. 1921.

[Seal] WALTER B. MALING.
Clerk.
By C. M. Taylor,
Deputy Clerk. [392]

[Endorsed]: No. 3721. United States Circuit Court of Appeals for the Ninth Circuit. W. R. Grace & Company, a Corporation, Appellant, vs. Ford Motor Company of Canada, Ltd., a Corporation, and Robert Nettlefold, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed July 22, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3721.

W. R. GRACE & CO., a Corporation,
Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Appellees.

Notice of Filing Apostles on Appeal.

To the Appellees Above Named, and to W. F. Williamson, Esq., Messrs. McCutchen, Olney, Willard, Mannon & Greene, Farnham P. Griffiths, Esq., and Messrs. Pillsbury, Madison & Sutro, Their Proctors:

You and each of you will please take notice that the apostles on appeal of the above-entitled action from the District Court of the United States for the Northern District of California to the above-entitled court were filed with the clerk of the said Circuit Court of Appeals on the 22d day of July, 1921.

Dated: July 25th, 1921.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,
Proctors for Appellant.

Receipt of a copy of the within notice of filing apostles on appeal is hereby admitted this 25th day of July, 1921.

W. F. WILLIAMSON,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
PILLSBURY, MADISON & SUTRO,
Proctors for Appellees.

[Endorsed]: No. 3721. In the United States Circuit Court of Appeals, for the Ninth Circuit. W. R. Grace & Co., a Corporation, Appellant, vs. Ford Motor Company of Canada, Ltd., a Corporation, and Robert Nettlefold, Appellees. Notice of Filing Apostles on Appeal. Filed Jul. 25, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 16,058 (District Court).

W. R. GRACE & CO., a Corporation,

Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,

Appellees.

Stipulation and Order Extending Time to and Including July 25, 1921, to File Record and Docket Cause.

IT IS HEREBY STIPULATED that the appellant above named may have to and including the 25th day of July, 1921, within which to file the record and docket the above-entitled action on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 23d, 1921.

W. F. WILLIAMSON,
McCUTCHEN, WILLARD, MANNON & GREENE,

Attorneys for Appellees.

It is so ordered.

WM. W. MORROW,

Judge of the United States Circuit Court of Ap-

[Endorsed]: No. 3721. In the United States Circuit Court of Appeals for the Ninth Circuit. W. R. Grace & Co., a Corporation, Appellant, vs. Ford Motor Company of Canada, a Corporation, etc., Ford Motor Company of Canada, Ltd., a Corporation, and Robert Nettlefold, Appellees, Stipulation and Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 25, 1921, to File Record and Docket Cause. Filed Jun. 24, 1921. F. D. Monckton, Clerk. Refiled Jul. 22, 1921. F. D. Monckton, Clerk.